

**An Evaluation of the Use of Mediation
in Environmental Dispute Resolution under s.268
of the Resource Management Act 1991**

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under s.268 of the Resource Management Act 1991

By N.C.Borrie

Since the 1970s there has been a growing interest in, and utilisation of, Alternative Dispute Resolution (ADR) techniques to resolve environmental conflicts in western societies. ADR was incorporated into one of New Zealand's main environmental statutes, the Resource Management Act 1991(RMA). Under s.268 of the RMA the Environment Court (the Court) may, if the parties agree, conduct mediation in order to facilitate settlement of resource management disputes.

The RMA, which has now been in operation for ten years, gives no guidance as to the way in which mediation is to be conducted. The Court has developed procedures and processes for administering and conducting mediation. This study critically evaluates the practice of Court assisted mediation of environmental disputes under the RMA. A literature review and interviews with stakeholder groups are used in this evaluation. The study shows that mediation generates benefits for the Court and participants. It also identifies limitations with the current mediation procedures and processes. These may impact the effectiveness of participants in mediation, their satisfaction with, and support for, the mediated settlement and with the environmental outcomes.

The study recommends a series of guidelines be prepared on the functions and administrative procedures of the Court and on the mediation process promoted by the Court. Further research is also recommended. It is considered that these recommendations, if implemented, will enhance the process for participants, ensure more equitable and consistent environmental outcomes, in terms of present and future generations, and retain public confidence in the mediation process.

Keywords. Environmental disputes, ADR, mediation, RMA, s.268, court assisted mediation, evaluation, prerequisites, stakeholders, benefits, limitations, good practice guidelines.

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Glossary

Hui: congregate, come together, meet. In H.W.Williams, *Dictionary of the Maori Language*, (7th ed.). Wellington: GP Publications, (reprinted 1991).

Iwi: nation, people. In H.W.Williams, *Dictionary of the Maori Language*, (7th ed.). Wellington: GP Publications, (reprinted 1991).

Marae: enclosed space in front of a house, courtyard, village common. In H.W.Williams, *Dictionary of the Maori Language*, (7th ed.). Wellington: GP Publications, (reprinted 1991).

Tangata Whenua: people belonging to any particular place, natives In H.W.Williams, *Dictionary of the Maori Language*, (7th ed.) Wellington: G.P. Publications (reprinted 1991).

Acronyms

ADR	Alternative Dispute Resolution
AMINZ	Arbitrators and Mediators Institute of New Zealand
BATNA	Best Alternative to a Negotiated Agreement
LEADR	Leading Experts in Alternative Dispute Resolution, previously known as Lawyers Engaged in Alternative Dispute Resolution
MfE	Ministry for the Environment
MoJ	Ministry of Justice
NSW	New South Wales
NZLJ	New Zealand Law Journal
NZLS	New Zealand Law Society
PCE	Parliamentary Commissioner for the Environment
RFBPS	Royal Forest and Bird Protection Society
RMA	Resource Management Act 1991
RMLA	Resource Management Law Association
UNECE	United Nations Economic Commission for Europe
WATNA	Worst Alternative to a Negotiated Agreement

Chapter 1: Introduction

1.1 Environmental conflict & alternative dispute resolution

Awareness of human impact on the global environment and its associated ecosystems has increased significantly in the post World War II era (Millar & Rothman, 1997). Modern communication systems have helped increase this awareness through publicising environmental catastrophes (Kamieniecki, 1993). This awareness has, to varying degrees, helped change the perception of those who make decisions relating to the environment. It has led to policy makers legislating to address environmental concerns at national and international levels (Kamieniecki, 1993).

Differing views about the state of the environment can result in conflict. Environmental conflict can occur wherever the allocation of resources, essential or non-essential, are subject to differing social, cultural and economic expectations and values. Such conflicts are complex and can be difficult, costly and time consuming to resolve. They can also be socially divisive (Sandford, 1989). The ability of traditional dispute resolution techniques such as litigation to handle complex environmental conflicts has therefore been questioned and alternative ways to resolve conflict have been sought.

Since the 1970s, interest in mediation as a method of conflict resolution has grown. In various parts of the world, particularly North America and Australasia, mediation has been promoted as a technique for resolving conflicts involving the allocation, management and use of natural resources and the built environment.

Support for the mediation of environmental disputes saw mediation incorporated into the reform of environmental legislation in New Zealand during the 1980s which culminated in the Resource Management Act 1991 (the RMA) (Baylis, 1992, p. 143). The reform of environmental legislation in New Zealand in the 1980s was partly influenced by international trends towards public participation in resource planning decision-making and support for the use of Alternative Dispute Resolution (ADR) techniques such as mediation for resolving environmental disputes (Sandford, 1989, p. 89). The purpose of one of the main environmental statutes in New Zealand, the RMA, is 'to promote the sustainable management of natural and physical resources'¹. This

¹ S.5 Resource Management Act 1991.

legislative purpose, coupled with the opportunity for input into policy formation² and decision-making³ by the public at large, has provided a forum for the expression and debate of differing social, cultural and economic values regarding the use and management of the natural and physical environment of New Zealand.

In New Zealand the law, and in particular the RMA, with its limited rights of appeal to superior Courts, is the traditional way of resolving environmental disputes. Under the RMA, where environmental disputes cannot be resolved to the satisfaction of all parties at regional or local authority level, they are able to refer the matter to the Environment Court for adjudication. Court action may involve the expenditure of considerable time and money by the parties involved. With only limited legal aid being available, not all citizens have the financial resources to participate in Environment Court proceedings.

Additional Dispute Resolution was incorporated into the RMA by Parliament with specific mention being made of mediation and conciliation in s.268 (1). Under the RMA the Environment Court may, if affected parties agree, initiate or facilitate mediation to encourage settlement of resource management disputes. These provisions of the RMA are innovative and potentially of far reaching significance.

The workload of the Environment Court, and the complex nature of environmental disputes, has resulted in delays in proceedings being adjudicated by the Court. Environment Commissioners have been called upon to mediate an increasing number of disputes referred to the Environment Court for resolution (Registrar of the Environment Court, 2000, p. 11). The Court facilitates mediation by providing a mediator and venue free of charge with each party bearing their own costs. Mediation is thus an attractive method of dispute resolution for some parties. Mediation has therefore been promoted as an alternative dispute resolution technique that offers a speedier, more flexible and less costly dispute resolution process than litigation.

1.2 Research aim and objectives

The RMA has been in operation now for ten years. The purpose of this study is to critically evaluate the current practice of Environment Court assisted mediation of environmental disputes under the RMA with a view to recommending ways to enhance

² See Part V of the RMA for various procedures for public input into policy statements and plans.

³ See Part VI of the RMA for various procedures.

practice in New Zealand. It is accepted that environmental mediation has a role within New Zealand as a method of dispute resolution.

Objectives:

1. To review the international literature on environmental dispute resolution as a broad conceptual context to inform the analysis of mediation of environmental disputes by the Environment Court under the RMA.
2. To analyse current environmental mediation practice under s.268 of the RMA.
3. To make recommendations about possible ways to improve environmental mediation practice within New Zealand.

1.3 Research design

The research objectives were developed into a series of research questions to frame the investigation. The key research questions were:

1. What are the relative advantages and disadvantages of mediation as a means of resolving environmental disputes?
2. What are the requirements of the mediation process in order for it to be an effective tool for resolving environmental disputes?
3. What are the provisions for mediation by the Environment Court under the RMA and how are these provisions being implemented?
4. What are the perspectives of different stakeholder groups on the practice of Environment Court assisted mediation under the RMA?

A review of the literature on environmental mediation was undertaken and the prerequisites for effective mediation identified. Using these prerequisites, a framework against which to evaluate environmental mediation practice in New Zealand was prepared. Based on this framework, questionnaires were designed for each stakeholder group. Interviews were undertaken throughout New Zealand. The responses were analysed and the Court assisted mediation process evaluated. Good practice guidelines were recommended with a view to enhancing environmental mediation practice in New Zealand.

1.4 Research limitations

This research has two limitations. First, the scope of the study had to be limited for a number of reasons. It was recognised that there were many individuals practising as mediators in the area of environmental planning and management in New Zealand. In addition to the Environment Commissioners, there are local authorities with staff trained in mediation, lawyers specialising in mediation and private individuals offering their services as mediators. However, given the limited time and resources available for this study, it was considered that the restriction of the study to Environment Court appointed mediators would yield a useful initial overview of the way in which the environmental mediation process was being conducted in New Zealand.

Secondly, a decision was made, in consultation with my supervisors, to limit the investigation of the mediation process to cases where participants had settled their dispute with the assistance of a Court appointed mediator. The parties had resolved the matter and an Environment Judge had signed the matter off. It was recognised that final settlement was at one end of the conflict resolution spectrum. There were other matters that could be usefully investigated, the main categories being:

- The reason/s for parties' unwillingness to enter into mediation.
- The extent to which mediation narrowed the issues in dispute.
- The nature of disputes unable to be resolved by mediation.

It was recognised that each of these categories could, potentially, provide valuable insights into the current practice of environmental mediation within New Zealand. Unfortunately time and resources did not permit such an extensive investigation.

1.5 Importance of the research

The use of alternative dispute resolution techniques such as mediation has been encouraged and promoted by various government agencies and is, increasingly, being used to resolve disputes. The RMA enables mediation, but gives no guidance as to the process and format to be followed. After a decade there has been virtually no in-depth evaluation of the mediation process instigated under s.268 of the RMA. An evaluation of current practice enables an assessment of the extent to which mediation is achieving its objectives, both in terms of procedures and substantive outcomes. This study also endeavours to provide a better understanding of environmental mediation in New Zealand.

1.6 Study structure

This study is organised as follows:

Chapters Two and Three provide a critical overview of recent international literature. These chapters review the major themes in the literature as a basis to inform the analysis of the situation in New Zealand.

Chapter Four explains the methodology used for data collection and fieldwork procedures. Using the themes developed in Chapters Two and Three, a framework is drawn up using the key points considered as necessary prerequisites for environmental mediation in the New Zealand context. Using this framework as a basis for interviews, responses were sought from stakeholders in mediation. The responses are then analysed qualitatively.

Chapter Five explains the relevant legislative provisions in New Zealand, describes the current environmental mediation practice within the Environment Court and the extent of Court assisted mediation.

Chapter Six presents the findings from interviews with Environment Judges.

Chapter Seven presents the findings from interviews with Environment Commissioners and Chapter Eight presents the findings from interviews with participants in the Court assisted environmental mediation process.

Chapter Nine discusses the findings and considers their implications for the continued use of mediation as a means of resolving environmental disputes in New Zealand.

Chapter Ten makes recommendations for good practice guidelines based on the findings of the study and recommends areas for further study.

Chapter 2: The Broader Context for Environmental Mediation: A Literature Review

2.1 Introduction

The practice of mediation has increased and mediation of environmental disputes has been promoted and institutionalised in a number of western nations, including New Zealand, since the 1970s (Sandford, 1989; Baylis, 1992; Stephens, Stephens & Dukes, 1995 cited in Blackburn & Bruce, 1995).

Based on a literature review, the purpose of Chapters Two and Three is:

1. To identify the reasons for the interest in, and promotion of, mediation, particularly in the context of environmental conflict;
2. To identify the benefits and limitations of using mediation as an alternative dispute resolution technique;
3. To discover those factors generally considered necessary for the settlement of environmental disputes through mediation.

2.2 The reality of environmental conflict

Conflict has been defined as 'struggles between two or more people over values, or competition for status, power, or scarce resources' (Moore, 1996, p. 1). An action by one party can 'trigger' a conflict or dispute⁴. Conflict over resource use and management has been part of the global experience 'since time began' (Johnson & Duinker cited in Mitchell, 1997, p. 218), as has concern at human impact on the environment (Conca, Alberty & Dabelko, 1995, p. 3). Throughout history, the allocation of resources has been subject to different interests and expectations. In turn, such differences may lead to armed conflict (war) between competing national groups or nations (Mitchell, 1997, p. 20). War is generally seen as an undesirable way of resolving competing demands for resources and alternative methods of resolving disputes have been promoted through organisations such as the United Nations. International Treaties, Agreements and Protocols have been drawn up between countries

⁴ Conflict arises when two (or more) parties perceive that their deep human values or needs are incompatible. It does not need a specific focus. A dispute arises when parties with incompatible interests, needs or goals, seek to maximise their personal benefit at the expense of others (Tillet, 1991, p. 7).

to resolve conflict over resource use, for example, the Law of the Sea Convention⁵. In nation states, laws and regulations seek to allocate and manage physical resources so as to minimise disputes. Where these allocations or actions are disputed, then various dispute resolution mechanisms may be used, such as litigation, negotiation, mediation, arbitration or lobbying for changes in legal or administrative procedures (Bingham, 1986, p. xvi).

The term 'environmental conflict' covers a very wide range of areas, such as resource use and management, air and water quality, pollution, hazardous substances, and the health and safety of present and future generations (Tillet, 1991, p. 137). Environmental conflicts therefore tend to be more complex than interpersonal disputes. They may include the possibility of irreversible environmental effects, the inability to accurately estimate the effects of complex activities in advance, and the claim of 'interest' by groups representing the public, future generations and the 'planet' (Rosenau cited in Kamieniecki, 1993; Tillet, 1991, p. 137; Parliamentary Commissioner for the Environment (PCE), 1996, p. 7; Adler, Barrett, Bean, Birkhoff, Ozawa, Rudin, 2000). Actions taken by individuals within nation states can impact other nationals or nations. An example is trans-boundary pollution on the Mexico/US border (Szekely, 1993). The scope of environmental effects therefore creates difficulties in deciding the boundaries of who should be involved in any dispute resolution process (Susskind & Weinstein cited in Kartez & Bowman, 1993), with the number of possible parties varying considerably (Tillet, 1991, p. 138). Bingham found that the average number of parties to an environmental dispute is typically four but may reach as many as forty (Bingham, 1986, p. 100).

Some ways in which environmental conflict manifests itself globally are follows:

Competition for resources

As world population grows, so do demands on the world's finite and renewable resources (Blackford, 1992b, p. iv). Many of these resources ensure survival as well as generate wealth and prosperity for nations. Environmental scarcity is already contributing to conflict in parts of the developing world. Environmental change and degradation is seen as having the potential for increasing conflict through increasing

⁵ The Law of the Sea Convention (UNCLOS) was signed in 1982 by 117 UN members and by 1994 had been ratified by over 60 nations. It came into effect in 1994 and relates to the exploration, exploitation & conservation of global marine resources.

scarcity, economic deprivation and forced migration (Homer-Dixon, 1993, p.245, 255; Homer-Dixon cited in Mitchell, 1997, p. 13). For some societies the threat from environmental change, with its social implications, is greater than the threat from military sources (Homer Dixon, 1993, p. 252). Diminishing resources, such as water, have the potential to impact global and local stability (Stein, 2000, p. 1). The search for new and supplementary resource sources, such as water or sites for the storage of hazardous waste, crosses national and cultural boundaries (Vig & Axelrod, 1999, p. 4). This can bring with it conflict between the present owners or guardians of those resources, often indigenous peoples and scientists, and resource development agencies. Rosenau defines this environmental struggle as being between the experts with a long-term view of the cumulative effects, and those desiring short term gain (Rosenau 1993 cited in Kamieniecki, 1993, p. 259).

Conflict of ideologies

Environmental conflict can cover ecological, anthropocentric (social /cultural) and economic spheres. Within each of these spheres, there are different values and interests, some stemming from deeply held cultural or religious beliefs (Saddler & Armour cited in Mitchell, 1997, p. 219; Carpenter & Kennedy, 1987; Moore, 1996). When an environmental dispute arises, the debate may stem from a conflict of these various values and interests and the apportioning of the benefits and costs (O'Hare, Bacow & Sanderson 1983 cited in Rundle, 1986, p. 256; Blackford, 1992b, p. iv). Industrialisation has seen the application of technology to resource use and management. As scientific knowledge increases, the impacts of industrial development on the global environment and human health are better understood, giving rise to concerns at their implications (Von Weisacker, Lovins & Lovins, 1997). Increasingly, cultural groups are resisting the dominant western development paradigm and seeking to develop their resources in ways that are culturally and spiritually acceptable (Taylor, Hadsell, Lorentzen & Scarce cited in Kamieniecki, 1993).

Perception of risk

There is a growing global awareness of the risks and uncertainty surrounding some technological advances. These may impact on the health and safety of present and future generations (Renn, Webler & Wiedemann, 1995). Some sectors of society may be more affected by environmental hazards than others (Hayward, 2000, p. 3) with the

term 'environmental racism' being used to explain the inequitable distribution of unwanted and dangerous land uses (Hester, 1998, p. 18).

2.3 The inevitability of environmental conflict

Change is inevitable in life and can bring with it 'turbulence' due to complexity and uncertainty. This, in turn, can result in environmental disputes at local, national and international levels (Mitchell, 1995; Mitchell, 1997, p. 74). Conflict can be beneficial when it exposes differing viewpoints and approaches to common problems and acts as a catalyst for collaborative decision-making (Carpenter *et al*, 1987; Crowfoot & Wondolleck, 1990; Sherman & Livey, 1992; Tice, 1993; Mitchell, 1997). There can be conflicts of interest and conflicts of principle (Amy cited in Crowfoot *et al*, 1990, p. 14). Conflict as such is therefore never 'ended', rather settlements are made for specific disputes (Crowfoot *et al*, 1990). The settlement can, depending on the method of resolution, leave a dissatisfied minority (Pammer, 2000, p. 2).

Disagreement in environmental disputes can arise on account of the information used in decision-making. Often the information available is inexact, open to interpretation, politicised, theory unsupported by research and the nature and extent of environmental or ecological problems uncertain, as is the consequences of any actions taken (Morris & Su, 1999; Mason, 1999, p. 23; Adler *et al*, 2000). The way information is used may increase confusion and complexity (Adler *et al*, 2000).

Environmental conflicts are therefore complex and may defy simple or traditional dispute resolution techniques, such as litigation where one party wins and the other loses. Where the use of a resource may generate ecological, recreational, social and economic benefits or costs, there is the potential for a clash of conflicting values. It has been noted that a state of tension exists between the desire for economic development and the protection and enhancement of the environment (Richard, 1993). In the case of undesirable land uses, e.g. prisons, hazardous waste treatment, the traditional approach to siting these land uses stimulates public opposition (O'Hare *et al* cited in Rundle, 1986, p. 256). Parties tend to develop 'positions' with preconceived ideas as to how to achieve their goals. Rigidity, suspicion, hostility and lack of communication are common (Rundle, 1986).

In litigation, the underlying concerns that are at the crux of the conflict may not be considered relevant (Ministry for the Environment (MfE), 1988). The conflict, while decided, essentially remains unresolved and 'seldom does any party emerge feeling like a winner' (Rundle, 1986, p. 257). The underlying concerns continue to exist and may resurface in another or similar form, at a later time, when favourable circumstances exist. If discounted or ignored long enough by those implementing the accepted dispute resolution mechanisms, these underlying issues may then emerge in a less acceptable and potentially socially destabilising form, for example sit-ins, protests or civil disobedience (PCE, 1996, p. A16). In New Zealand there have been protests over disputed resources, for example Lake Manapouri hydroelectric development proposals of 1960s, Moutua Gardens in Wanganui in 1990s, and the current West Coast forest controversy. The limitations of traditional ways of resolving disputes have caused people to look for more participatory methods of decision making that take into account the values and views of various groups within society.

2.4 Theoretical basis for environmental mediation

There is a strong emphasis on participatory decision-making in the recent literature on democracy and planning theory. Mediation, with its direct involvement of all affected parties in discussion with a view to reaching a mutually acceptable settlement or decision, could be considered a form of participatory decision-making. Although much has been written about mediation, there is no clear theory (Noll, 2001) and, in particular, no single agreed upon theory of environmental mediation (Blackburn *et al*, 1995). Mediation theory is evolving and debate continues among the theorists as new theories emerge (Della Noce, 1998). Theoretical ideas are drawn from a wide range of disciplines (Susskind, 1986). As recently as 2001 Noll was suggesting a theory of mediation based on conflict dynamics (Noll, 2001). There appears to be no agreement over what are the essential requirements for mediation (O'Leary cited in Blackburn *et al*, 1995) or its core features (Boulle, Jones & Goldblatt, 1998, p. 3). In the next section I turn to the recent writings on democracy and planning theory in an endeavour to find the theoretical basis and justification for the use and promotion of environmental mediation.

2.4.1 Democracy and participation in decision-making

Participation in decision-making is based on the theory of democracy. Equality (everyone has equal political power) and liberty (people are not controlled by any

individual or group) are considered fundamental requirements for democracy (Harrison cited in Craig, 1998, p. 867). The general adherence to the democratic ideal of all adults having the opportunity or 'right' to participate in decision-making has occurred in the last 100 years (Held, 1987).

The concept of democracy is a contested concept (Harrison cited in Craig 1998, p. 867) in that different systems of democracy have been promoted and implemented in society over time (Lively cited in Metcalfe 1999, p. 9). The two main models of democracy are direct or participatory democracy, where citizens self govern or self regulate, and liberal or representative democracy, where elected representatives make decisions on behalf of the collective community within the framework of the law (Renn *et al*, 1995, p. 21; Held 1987).

The direct or participatory democracy of Greek city-states has historically been seen as promoting liberty and equality (Harrison cited in Craig, 1998, p. 868). Having citizens directly participate in decision making, as in Greek city- states, was not considered feasible or necessarily desirable in large nation states and there was a move towards a small number of citizens undertaking the task of governance (Honderich, 1995, p. 183-4; Harrison cited in Craig, 1995, p. 868).

Representative or liberal democracy involves the election of a small group of citizens who serve as representatives of the community as a whole for a set period of time (Reeve cited in Craig, 1995, p. 271, Held, 1987, p. 4). Representatives are confirmed by majority vote and their performance reviewed periodically through the election process. Citizens, by their vote, give their representatives authority to make decisions on their behalf in particular matters. The government is given lawful authority over the people through laws passed by the elected representatives. Within a liberal democracy humans are seen as 'individuals' with 'rights' that need to be protected from the excesses of the state (Mason, 1999, p. 21).

Representative democracy assumes that, if people as a whole are put in charge, they will promote the interests of the people as a whole (Harrison cited in Craig, 1995, p. 870). When seeking to represent the various interests of electors, elected representatives can decide between conflicting interests by using the theory of utilitarianism, that is 'the best action is the one that will result in the greatest happiness and least pain for the

greatest number of people' (Harrison cited in Craig, 1995, p. 870). The theory of utilitarianism helped form the concept of 'the public interest'. An action is considered in the public interest 'if it is to the interest, advantage, benefit or good of some group or set of persons considered members of the same society'. It assumes that a wide range of people within a society share common interests (Weale cited in Craig, 1995, p. 832), though this is disputed (Renn *et al*, 1995, p. 2). It may also include the idea of a common good from which all citizens benefit such as clean air or environmental amenity. Decisions can be made by balancing the advantages and disadvantages of competing but incompatible activities (Weale *et al*, 1995, p. 834). Limitations of the concept of the public interest are that it may not necessarily satisfy all subgroups or give weight to relevant or significant values held by the minority. The winner (the majority) takes all and self-interest in the short term can take precedence over important long-term interests (Millar cited in Harrison, 1995, p. 870).

Within liberal democracy there are diverging viewpoints. Social democracy arose in the 1880's as a consequence of theorists, such as Marx, considering that some liberal ideals could only be realised through some form of socialism. Social democracies tended to have strong regulatory powers invested in government agencies (Millar *et al*, 1995, p. 827). In the post World War II era, social democracy gained widespread electoral support and sought to achieve social justice through government control of public expenditure, the provision of welfare services and the redistribution of income and wealth. Nevertheless by the 1970s social democracy was being challenged by two divergent approaches: neo liberalism (New Right) and participatory democracy.

Neo liberalism opposed the state's attempts to control people's lives or pursue social justice or the common good (Millar *et al*, 1995, p. 828). The role of the state was as a neutral or minimal body whose role was primarily restricted to correcting market failures (Wolfe cited in Craig, 1995, p. 619; Held, 1987, p. 243; Memon *et al*, 1993, p. 70). Regulating the market and redistribution of wealth was seen as morally illegitimate and likely to be self-defeating (Millar *et al*, 1995, p. 828). States were encouraged to use market forces and economic instruments to solve environmental problems (Williams, 1997, p. 15). The need for some direct state involvement in environmental matters was recognised in some areas, for example ensuring pollution-free atmosphere (Wolfe, *et al*, 1995, p. 618; Buhrs cited in Memon *et al*, 2000, p. 29). Electoral success by those

promoting libertarian views has meant the state's role of integrating private and public interests has declined (Buhrs *et al*, 2000).

The interest in participatory democracy was renewed through the popular protest movements of the 1960s and 70s that raised awareness of citizens' concerns and sought to influence decision makers (Renn *et al*, 1995, p. 18-19). The effectiveness of and justification for representative democracy was questioned, due to its limited responsiveness to citizens concerns (Mason, 1999, p. 22). It was considered that it contributed to political apathy due to the perception that there was little meaningful civic self-determination within liberal democracies (Dunn cited in Mason, 1999, p. 22). The desirability and potential advantages of citizen input into decision-making came to be acknowledged and a number of methods for enabling citizen participation were promoted: citizens advisory committees; planning cells, citizens juries, negotiation and mediation (Renn *et al*, 1995). Later theorists advocated a return to participatory democracy (Barber cited in Metcalfe, 1999, p. 14). Participatory democracy '...emphasises debate and reasoning about and toward public interests and actions' (Dryzek, 1990, p. 124). More recently the term environmental democracy has been used. It has been defined as a participatory and ecologically rational form of collective decision-making. It '...prioritises judgments based on long-term generalisable interests, facilitated by communicative political procedures and radicalisation of existing liberal rights' (Mason, 1999, p. 1). Communicative decision-making procedures, such as mediation, are considered to respect the social and ecological conditions of communicative freedom (Mason, 1999, p. 2).

Effectiveness of participatory democracy

The recent literature on democracy identifies three facets to participation: the selection of participants, the extent to which participants can participate and the way in which participation is managed. In an ideal situation, parties reach a consensus that reflects the different perspectives and concerns of each participant (Rowlands, 1999, p. 12). The quality and quantity of participation can affect its effectiveness. It was recognised that the way the participation process is conducted can impact the outcome. Discourse theorists put emphasis on the importance of the nature or type of 'discourse' that occurs. A discourse can be defined as 'free and open communication in political life', which encourages reciprocal understanding, trust and consensus (Dryzek, 1990, p. 38).

Factors that potentially affect participation in discourse are:

- Gender, class or racial bias

Feminist epistemology recognises that bias can occur on a gender, class and racial basis, so it is therefore necessary to understand the underlying assumptions behind any participatory approach. Of concern is where there is an unintentional bias towards particular groups within the community, e.g. the literate, articulate, informed (Harding, 1986). Groups potentially disadvantaged may be cultural groups with an oral tradition; where English is a second language; those with poor literacy skills or the young.

- Procedure

The hearing procedure, room layout and presence of technical staff can impact where power lies. Such features may impact on the decision makers and the participants. Officials and staff may give the impression of enabling open, committed, participatory decision-making but what happens in reality is only marginal inclusion of the public (Futrell, 1999).

- Language

Language is recognised as having the power to influence the way people perceive and behave in the world (Burman & Parker, 1993). Language or 'speech acts' can be used to communicate many things depending on the speaker's intention, e.g. ask questions, give orders, make promises. What is said, what is done in saying it and what is done by saying it, are all significant (Austin cited in Craig, 1995, p. 82). Thus, a statement can lead hearers to believe certain things and to respond or act in a certain way (Bach cited in Craig, 1995, p. 82). Speech acts generally have an ulterior purpose, depending on the type of language used that can be distinguished by the type of attitude expressed. Deception may be used. If exposed the speaker then has to regain trust by convincing the audience that they are sincere and possess the attitude expressed (Bach *et al*, 1995, p. 85).

Language is made up of tokens that create a mental image in a person's mind. When a person communicates what they believe is important, they use images that mean the most to them. The type of language and choice of words is therefore important. Language can take direct or indirect, literal or non-literal, explicit or implicit forms. It is important therefore to differentiate between language use and linguistic meaning (Bach *et al*, 1995, p. 86). It may be necessary to rephrase a statement to ensure the

correct meaning has been conveyed (Mulholland, 1991). This is particularly important where statements shared in a discussion are being rephrased into more specialised language such as legally defined concepts or statements.

- The type of information used in decision making

Knowledge can be valuable as it reduces uncertainty, can change people's preferences and can build trust. Lack of knowledge can perpetuate conflict (Noll, 2001). By supplying, withholding, selectively revealing information or lying, parties can gain an advantage (Applbaum, 1987, p. 280-283; Wasch, 1995, p. 42; UNECE, 1996, p. 34⁶). Often decision makers rely heavily on the scientific realist mode of collecting, collating and using 'facts' to define what is possible and predictable within the realm of scientific knowledge. This approach considers that some things can be proven and there are rules that allow prediction. A difficulty is that the decision-making process may not accept a problem exists until it can be proven or predicted.

When it comes to decision-making, the facts strongly influence the outcome despite the input of experiential knowledge, which is perceived to be of limited merit. Decision makers often appear reluctant or unable to use types of research and some forms of experiential knowledge in the decision-making process, seeing it as less scientific and less reliable (Christie, 1991).

For those wishing to put an alternative scenario the cost of buying factual data, with its associated research cost, is often prohibitive (Shields, 1991; Walker, 1996; Adler *et al*, 2000) and may exclude or deter some from participating in the process (PCE, 1996, p. 46). Often the lack of evidential information has been 'critical to the outcome of a hearing' (Shields, 1991). That there may be an imbalance in the level and quality of information provided to decision makers by parties has been recognised (MfE, 2001b).

It has been noted that participation has become more difficult than in the 1960s as idealism, good intentions and protest are no longer enough due to the legal and technological requirements of the decision-making processes. Input has changed from amateur to high-tech professional (Hester, 1998). Some participants have adapted to these changes and become more sophisticated and selective (Pellow, 1999).

⁶ UNECE: United Nations Economic Commission for Europe. The Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters was adopted June 1998 and came into force 30 October 2001[Online]. <http://www.unece.org/env/pp/>.

- Interpretation of data

The interpretation of data can be affected by bias, egocentric and self-serving tendencies (Morris *et al*, 1999, Adler *et al*, 2000). Those who interpret the data may bring assumptions to that interpretation which can undermine the 'facts' they find from the information. While the goal is to empower the people through participation and give them a voice, there is a danger that through the interpretation of the discussion much of its impact and power is lost (Burman *et al*, 1993).

- Speaking for others

The practice of speaking for others (as an advocate) in various contexts has been identified in theories such as critical theory. It recognises that a person's location or position affects the meaning and truth of what is said. Speaking for others can be unhelpful and even harmful in some situations. To overcome these problems, reductionist theory can be applied, thus truth and meaning of what someone says is read straight from the discursive text. All parties affected should therefore be given an opportunity to participate and put forward their viewpoint (Alcoff, 1991).

The discourse process aims to be inclusive and impartial. People must be motivated to reach agreement by convincing reasons rather than by any form of coercion or deception. Ideally all parties should be communicatively competent and have unlimited participation opportunities. Participants may need education in order to become competent to participate (Dryzek, 1990, p. 43). In such circumstances all that counts is the strength of the argument and its supporting evidence (Dryzek, 1990; Dobson cited in Doherty & de Geus, 1996, p. 134-5).

- Inequality

Inequality and the inability of groups and individuals to develop and challenge arguments may exist. Participants need to be communicatively competent (Dryzek, 1990) and have appropriate information (Shields, 1991).

- Entrenched ideas and manipulation

People bring in preconceived ideas and notions. Individuals must learn in order for these to change. It is considered that individuals rather than organisations learn. It is therefore possible that individuals in a discussion will learn and their ideas change but the underlying values of the organisation they represent will not (Argyris, 1988, p. 540).

Some people may have ulterior motives for participating and seek to manipulate the situation (Dryzek, 1990, p. 125).

- Role setting

In some instances participants are required to overcome misconceptions or limitations imposed by their 'role' in the discussion (Mulholland, 1991).

2.4.2 *Planning theories and participation in decision-making*

There is a parallel emphasis within recent planning theory literature on the importance of public participation in decision-making. Planning has been defined as '...selecting a course of action to achieve an end' (Banfield cited in Faludi, 1973) or a process for determining appropriate future action (particular ends and means) through a sequence of choices (Davidoff, 1965). Planning has, over time, come to be viewed as both a technical and political action (Taylor, 1998, p. 17) that seeks to maximize welfare and solve problems using analytical tools (Sandercock, 1998, p. 86,89).

In the post World War II era, as support for social democracy grew, the State was seen as having a significant role in many activities. Rational comprehensive or 'blueprint' model of planning was dominant. In this model, planning was considered primarily a 'physicalist' activity (Taylor, 1998, p. 4) undertaken to improve the world by using scientific knowledge and instrumental rationality (Young cited in Healey, 1997, p. 9). It was assumed by those in charge of the process, that all people agreed with the aims of planning, that the experts 'knew' what people wanted and were therefore best placed to look after the public interest (Taylor, 1998). The involvement of or consultation with existing or future inhabitants was not seen as relevant (Sandercock, 1998, p. 88). Decisions were considered morally justified when they brought about the greatest happiness or utility for the greatest number (Taylor, 1998, p. 80).

By the late 1960s public and professional confidence in rational planning had been lost, with planning being criticised by both the people affected and theorists (Brindley, Rydin & Stoker, 1996, p. 9; Taylor, 1997, p. 45,47; Sandercock, 1998, p. 88; Jacobs cited in Hayward, 2000, p. 29). Public protests highlighted the fact that planning was a politically contentious subject with planners criticized for promoting the consensus view (i.e. people are an undifferentiated group) and failing to consult and take public attitudes into account (Goodman, 1972; Brindley *et al*, 1996, p. 14,17). Marxists considered that

planning was in the service of capital with planners putting land interests before people and the environment (Healey, 1993, p. 234; Sandercock, 1998, p. 92). In an endeavour to address criticisms, planning theorists have looked for ways to involve the public in planning through participation, mutual learning and empowerment (Taylor, 1997; Sandercock, 1998, p. 91). Davidoff (1965) promoted advocacy planning where the planner was an advocate for low income and marginalised groups in a bottom-up participatory approach (Goodman, 1972; Hayward, 2000, p.30). Arnstein (1969) considered that participation had limitations, as within the participation process there could be degrees of citizen power and degrees of tokenism. Such differences were important as:

There is a crucial difference between going through the empty ritual of participation and having the real power needed to affect the outcome of the process...the fundamental point [is] that participation without the redistribution of power is an empty and frustrating process for the powerless. (Arnstein cited in Taylor, 1997, p. 89).

It was considered that a fundamentally flawed economic and political system could not empower people (Goodman, 1972) and the power to make or influence decisions still resided with '...the possessors of large amounts of wealth, power and influence' (Davies cited in Taylor, 1997, p. 51). Radical planning sought to bring about political and social changes to address such issues (Friedmann cited in Hayward, 2000, p. 31). Equity planning sought to redistribute power, resources and participation from local elites to the poor and working class (Sandercock, 1998, p. 93). The planner was still an 'elite' but endeavoured to enable and enhance communication by all sectors of society.

By the 1980s the value of local or experiential knowledge acquired through social learning was being acknowledged. The term 'deliberative' planning has been used by Hayward to describe the approaches taken by planning theorists during the 1980s and 1990s to promote inclusive, democratic discussion on planning issues and urban problems (Hayward, 2000, p. 16,17). Hayward uses the term deliberative to describe the common thread of public deliberation that exists within the 'communicative', 'participatory', 'critical or 'collaborative' planning theories. Planning has taken an 'argumentative turn' (Fischer & Forester cited in Hayward, 2000) becoming increasingly 'an interactive, communicative activity' (Innes cited in Hayward, 2000, p. 17). Collaborative approaches to decision-making that acknowledge and respect differences and encourage collective responses to issues are promoted. Some planners consider that it extends to social and economic issues (Sandercock 1998 cited in

Hayward, 2000, p. 18). Better administrative decisions are potentially possible due to the technical, scientific and environmental knowledge of individuals being brought into the decision-making procedure at an early stage (Kramer, 1999, p. 7).

It is considered that people are generally more supportive of decisions they have been involved in developing than those imposed on them without consideration of their concerns (PCE, 1996, p. A16). Barriers to communication are to be removed in order to have open discourse (Sandercock, 1998, p. 98). Habermas (1984) considered that for communication to occur there were certain preconditions and presuppositions for an 'ideal speech' situation. The process would require a framework of communicative ethics (Johansen cited in Craig, 1995, p. 312). Planning thus becomes the course of action chosen after informed, inclusive debate (Healey cited in Fischer, 1993, p. 237-8).

2.5 Conclusion

Environmental conflict and disputes are inevitable due to the different values and interests of members in society. Various dispute resolution mechanisms may be used to manage or resolve conflict. Recent literature on democracy and planning has put a strong emphasis on public participation in decision-making. Participation has, consequently, been endorsed in planning and dispute resolution regimes. The significance of environmental mediation as a dispute resolution mechanism that enables participation and enhances democratic decision-making should be judged in that context.

Chapter 3: The Process of Environmental Mediation: A Literature Review

3.1 Introduction

Mediation currently enjoys a high profile as a method of Alternative Dispute Resolution (ADR) for environmental disputes. The extent to which mediation is used and the approach taken varies (Rubin, 1994; Boulle *et al*, 1998; Adler cited in Devine, 2001). In this chapter I will review the recent international literature on different aspects of environmental mediation as a process, based on the experience during the last thirty to forty years.

3.2 Defining mediation

The definition of mediation varies on account of the terms used in the definition itself, the lack of agreement on an accepted set of core features, the wide range of situations in which it is used, the flexibility of the process and variations in current practice (Crowfoot *et al*, 1990; Chornenki *et al* 1996, p. 81; Boulle *et al*, 1998). Some go so far as to suggest that self-interest may determine how different professions and organizations define mediation (Boulle *et al*, 1998, p. 7). The definition may also be influenced by either the conceptualist 'ideal' approach to mediation, which sets out procedural ideals, or the descriptive approach, which draws from current practice (Boulle, 1996, p. 5).

A general definition is therefore seen as beneficial (Boulle, 1996, p. 7) and necessary (Devine, 2001, p.2, 3). To help define mediation it is useful to state the key attributes of the process. It is a consensual decision making process; a third party helps the parties in dispute to achieve improved decision-making and the parties reach a decision they can accept (Boulle *et al*, 1998, p. 8). The parties themselves make the ultimate decision (Mills, 1990, p. 65). A general definition of mediation is '...an acceptable, neutral, third party, who has limited or no authoritative decision-making power, assists disputants to voluntarily work through disputed issues in order to reach a mutually acceptable resolution' (Moore, 1996; Borisoff & Victor, 1998). This definition can be extended to include '...settlements based on the parties' needs, wants and concerns (their interests) and on an examination of their alternatives to a negotiated settlement' (Chornenki *et al*, 1996, p. 79).

Environmental mediation is considered to differ from other mediation contexts. Features of family or industrial mediation may not be appropriate for environmental disputes (McDuff cited in MfE, 1988, p. 27). Environmental disputes can involve issues that refer to competing claims to, control over, and use of, the environment by individuals and groups with differing value systems and a variety of vested and community interests (Tillet, 1991; Stein, 1997a, p. 5; Richard: 1998; Boulle *et al*, 1998, p. 218). Decisions can be highly technical, as they have to take into account the dual perspective of present and future economic and environmental needs. The impact of the decisions made can extend beyond the present immediate neighbours to other areas and future generations (Kramer, 1999, p. 7; Stein, 1997, p. 5). Often it is the decision of the local government authority that is being challenged in Court. The dispute may have been publicized in the media (Tillet, 1991, p.140) and the parties may have preconceived ideas about the other parties as a consequence (Stein, 1997, p. 5).

The definition of environmental mediation therefore varies from the general definition of mediation. Environmental mediation has been defined as:

The use of an impartial or independent (we prefer not to use the term neutral) third party who helps to convene and facilitate discussions and dialogue among parties in conflict over issues concerning the use, allocation, protection, or enhancement of natural resources. (Stephens *et al*, 1995, p. 175).

It involves:

Bargaining, sharing information, and ultimately compromising on original positions so as to achieve a solution 'acceptable' to all parties involved.
(Jacobs & Rubino 1987 cited in Blackford, 1992b, p. 2).

The 'wins' or 'losses', therefore, may impact not only on the immediate parties but also the wider society. A decision or settlement does not necessarily mean that the dispute is resolved (Boulle *et al*, 1998, p. 8). The appropriateness of applying environmental mediation practices in different cultural and legal contexts has also been raised. It has been suggested that there is a need to define a mediation process that takes into account the uniqueness of New Zealand's circumstances (Blackford & Matunga, 1991; Bollard *et al*, 1998, p. 70). Mediation is considered to resemble the consensus approach taken to decision-making by Maori (Blackford & Matunga cited in Blackburn *et al*, 1995, p. 188).

Further debate centres on the meanings of such words as ‘acceptable’, ‘successful’ and ‘voluntary’ in the above definitions. Voluntary⁷ is taken to mean freely chosen yet it can, in fact, involve pressure to try mediation, including pressure to at least try mediation before resorting to the Court (Moore, 1996). A ‘mutually acceptable’ outcome requires the defining of what is acceptable. Acceptable has been defined as ‘worthy of being accepted, pleasing, welcome, adequate, satisfactory, tolerable’ (Concise Oxford Dictionary). It can be difficult to determine the success of mediation. ‘Success’ has been defined as the accomplishment of an aim or purpose. Settlement may be reached during the stresses of negotiation and the mediation seen as a success on account of resolution. However a party may, on reflection, or after interaction with other parties or constituents, consider the settlement is intolerable (Buckle & Thomas-Buckle, 1986, p. 56) or an illusion (Kartez & Bowman, 1993, p. 329) and the mediation unsuccessful. A party may decide to put resources into litigation in order to ‘win’ rather than accept a mediated settlement that is just tolerable.

Success may be measured in a number of ways, some of which are:

- How often agreements have been reached (Bingham cited in Lake, 1987, p. 316; Cormick cited in Buckle *et al*, 1986; Noll, 2001);
- The extent to which the parties support the agreement through the implementation phase (Bingham, 1987; Buckle *et al*, 1986, p. 56);
- Whether or not the parties gained a sense of empowerment and understanding of other viewpoints (Barach Bush & Folger 1994 cited in Noll, 2001);
- Whether or not interpersonal relationships were maintained or enhanced (Noll, 2001);
- The fairness, efficiency and stability of the process and the outcome (Susskind and Ozawa cited in Buckle *et al*, 1986, p. 56).

Bingham (1987) endeavours to define those principles that appear to increase the likelihood of success. They are:

- The mediator’s assistance in assessing the dispute at the outset;
- The party’s incentive to negotiate and
- The way the consensus-building process was conducted.

⁷ Voluntary: done, given, or acting of one’s own free will (*Concise Oxford Dictionary*, 2001).

Poitras explains the relationship between the principles and prerequisites of successful mediation (Poitras & Renaud, 1997). See Table 1.

Table 1: *Interaction between the principles and prerequisites of successful mediation*

Principles of Mediation	Prerequisites
Prevent conflict from escalating	Willingness to resolve the dispute
Reconcile interests	Willingness to explore areas of disagreement
Seek a mutual gain solution	Willingness to seek a win-win outcome
Coordinate party effort	Authority to make decisions

In *Mediation and Reconciliation of Interests in Public Disputes*, Poitras & Renaud, (1997).

There is a danger of judging the success of mediation by the number of signed agreements achieved. Mediators may feel required to achieve an outcome when, in reality, the outcome is for the parties to decide. Mediation frequently fails (Buckle *et al*, 1986). A ‘failed’ mediation could however be considered successful if:

- It improves relationships between parties;
- It creates procedures that assist the parties (Buckle *et al*, 1986, p. 55);
- The issues in dispute are narrowed, thereby making it easier for the court to handle (Talbot cited in Buckle *et al*, 1986, p. 58);
- The parties go on to settle the matter themselves (Buckle *et al*, 1986, p. 63);
- The parties are educated as to the positions and interests of others;
- Their ability to handle future disputes is increased through the information and experience gained (Buckle *et al*, 1986, p. 59).

Some parties may see a failed mediation as a success if it delays the case proceeding to court, enables them to discover information for a later trial, or means the Court views them favourably on account of their willingness to cooperate and try mediation. This view of success could be considered flawed (Buckle *et al*, 1986).

3.3 The promotion of environmental mediation

Litigation, with specialized judicial intervention, is perceived as having a number of strengths. Acknowledged strengths are: an impartial third party making the decision based on facts (Kubasek & Silverman, 1996, p. 36; Stein, 1993, p. 279); all evidence that supports a position is presented (Kubasek *et al*, 1996); the taking of evidence on oath; the testing of evidence by cross examination (Williams 1985 cited in Blackford 1992b, p. 9) and the public nature of the process (Blackford, 1992b, p. v). It allows precedent-setting interpretation of the law by the Court and may produce more consistent outcomes (Kubasek *et al*, 1996, p. 61). Impending court action can provide an impetus for parties to enter mediation. However, increasingly, it has been recognised that the adversarial approach has limitations when confronted with complex multi party, multi-issue disputes. As Sherman and Livey state

The processes we have devised to resolve our conflicts need fixing. Simply put, we can no longer afford the cost in terms of dollars, time, lost competitiveness and relationships required to make our adversarial decision-making mechanisms work. (Sherman *et al*, 1992, p. 13).

Litigation has been perceived by some writers as lacking flexibility (Mitchell, 1995; Sandford, 1989; Reed, 1995; Sherman *et al*, 1992), procedural barriers exist (Valiante & Muldoon, 1993), the Court system is over loaded and subject to time delays (Sherman *et al*, 1992), which can lead to frustration with the system and its associated expense (Aspinall, 2001). In a market-orientated economy, market dominance requires speedy resolution of conflict to maximise returns (Crowfoot *et al*, 1990). The adversarial system:

Resembles a contest where opposing parties call (usually) expert witnesses to provide evidence, both fact and opinion. Legal advocates endeavour to 'build up' their clients case and 'break down' that of their opponents by examination, cross examination and re examination of witnesses and by legal submission. (Williams 1985 cited in Blackford, 1992b, p. 9).

The Judge then decides the 'winner' after hearing the evidence and argument (McDowell & Webb, 1995, p. 4). It is suggested that adversarial procedures focus on positions and interpreting the law rather than the underlying concerns or interests of the parties (Williams cited in Blackford, 1992, p. 9; McKenzie, 1998, p. 22). The Court may be able to overcome such tendencies through the impartial interpretation of data.

The Court is restricted in the decisions it can make by the grounds of the appeal, the relief sought and the efficient way in which the legal arguments and technical

information are presented (Blackford, 1992b). Disputes may be broader than the statutory procedures (Sheppard 1993 cited in Bollard *et al*, 1998). The need to fit the dispute to the legal framework can potentially distort the issues and fail to deal with the underlying issues. Parties may become polarised and entrenched in their position (Chart, 1988, p. 5). Such an approach can affect the perception of the facts by the parties, impede the discovery of efficient settlement options, produce unwise agreements and affect on-going relationships (Fisher, Ury & Patton, 1999, p. 5-7). Information can be used as a weapon rather than a tool in a creative decision-making process (Andrews, 1992, p. 203). Egocentric tendencies to interpret, accept or discount data to serve a particular cause have been observed where environmental conflict exists and may prevent a fair decision (Morris *et al*, 1999, p. 3; Kubasek *et al*, 1996, p. 37).

3.3.1 *The benefits of mediation*

There are various conflict resolution models available as an alternative or supplement to litigation. Some of the terms used to describe these techniques are: conflict resolution, environmental dispute resolution, conflict management, alternative dispute resolution, mediation, negotiation, arbitration, and mini-trials. The main approaches are negotiation, mediation, arbitration and litigation (Spiller, 1999). These ADR techniques, such as mediation, are being promoted as a more effective way to deal with environmental conflict in western democracies on the following grounds:

Cost saving

Legal rights can often only be realised or enforced through litigation (Valiante *et al*, 1993, p. 44; Dal Pont, 1996, p. 74). This may create inequity in that some parties may be able to afford skilled legal expertise while others may not (Kubasek *et al*, 1996, p. 37). The cost of legal and technical expertise can be considerable (MfE, 2001) and may affect a party's ability to participate effectively (PCE, 1996, p. 45). The cost may be a reason to avoid, or withdraw from, litigation (Bevan, 1992, p. 7; Kubasek *et al*, 1996, p. 37). The awarding of costs, where the loser pays the winner's costs, can make the risk of losing litigation doubly prohibitive (Valiante *et al*, 1993, p. 145; Salmon, 1998, p. 13). Environmental conflicts can be technically complicated and expensive to litigate. It has been suggested that, when parties reviewed a dispute for mediation, only 20% of legal costs and 40% of technical investigative costs had been incurred at that point (Young, 2000). It is recognised that access to the speedy and inexpensive determination of justice is required if legal rights are to be realised (Hearn, 1987; Webb, 2000). For

these reasons there has been a trend away from litigation towards the use of alternative dispute resolution for resolving environmental disputes (Sandford, 1992).

Mediation enhances participation in decision-making by virtue of a less formal and less expensive process (Crowfoot *et al*, 1990; Blackford, 1992). Mediation is therefore considered closer to a true form of democracy, where people have input into decisions that affect their lives and environment (Fischer & Forrester, 1993; Taylor, 1998). It is not, however, cost free. There are costs for the preparation and attendance by parties and their legal, technical and professional advisers and for the mediator and venue (Stein, 1995, p. 6; Chornenki *et al*, 1996, p. 85).

That environmental interests have found it difficult to fund mediation from their own resources has led to the concern that the process favours the parties with the money to pay the mediator (Harrison, 1997, p. 82). In New Zealand, the use of a member of the Environment Court as mediator is seen as a cost saving (Somerville, 1997, p. 47). Parties appear to accept the lack of choice of mediator where the mediation service is provided free (Saxe, 1997, p. 239). Whether mediation is, in fact, cost effective could be disputed if other matters, such as the environmental trade-offs, were taken into account (Bevan, 1992).

Time saving

Time is taken in preparing for, and participating in, litigation. Some environmental disputes can take years to resolve. It has been suggested that conflicts require time to mature, while the parties play out their legal options, to the point of understanding when the sides are deadlocked and that negotiation is the only option. An impending court case, with its potential for loss of control over the outcome, can be an incentive for mediation (Talbot, 1983). Weariness caused by the time and expense of litigation can impact participants' lives and can be a catalyst for parties to mediate during litigation (Talbot, 1983, p. 7; Webb, 2000, p. 365).

While mediation saves time compared to litigation, it nevertheless takes time and should not be treated as a quick fix option. Negotiating quick agreements or 'deals', such as side agreements, may not be successful in the long term as conflict may continue and undermine the agreement when the limitations and side effects of the agreement become apparent (Kartez *et al*, 1993, p. 329).

Improved and more appropriate outcomes

It is considered that mediation leads to improved and more appropriate environmental decision-making due to the fact that interested parties discuss and share facts and goals while working towards a solution (Mitchell, 1997; Grigg, 1997; Trenorden 1997; Salmon, 1998). Discussion can increase understanding and reduce or resolve conflict. It can help parties get 'unstuck' from narrow win/lose solutions (Chart in MfE, 1988, p. 3). Mediation could be considered to:

Encourage the growth of cognitive (importance of knowledge and learning) and normative (usual, typical) understanding that facilitates voluntary co-operation whether or not the resulting agreements take the form of fully binding legal agreements or not. (Vig *et al*, 1999, p. 4).

It provides a way of reframing issues that recognise and incorporate the perspective of the local community or fringe groups (Reed 1995; Crowfoot *et al*, 1990; Grigg 1997; Sheppard 1997). It is seen as allowing more flexible decision-making than litigation in that it cannot be used to establish legal precedent (Sandford, 1989). It aims to create workable solutions that are orientated to add value or benefits to each party and to create win/win or mutual gain solutions rather than winners and losers (Fisher *et al*, 1999, p. 12; Moore *et al*, 1998; Bollard *et al*, 1998, p. 715). It is considered that, in many environmental disputes, creative compromises rather than legal winners are desirable (Kubasek *et al*, 1996, p. 37). Mediation assumes that conflict is resolved because people will accept what they help create (Blackburn *et al*, 1995). In addition, it is considered more responsive to cultural traditions and aspirations (Blackford *et al* cited in Blackburn *et al*, 1995, p. 188; Sakar, 1998, p. 31).

Reduces the workload in the Court

In western democracies there is concern at the increased workload of the Courts. Mediation is considered to lessen the Court's workload as matters are either settled without the need for a hearing before the Court, or only those parts that remain in dispute are heard (Kubasek *et al*, 1988; Kenderdine 1998; Somerville 1996; Sheppard 1996). The case list within the New Zealand Environment Court system is large with appeals waiting up to 22 months to be heard in Court (Registrar of the Environment Court, 2000; Department of Courts, 2001, p. 19). The cost of delays can be significant to a commercial entity (Hardie, 1997, p. 2). Increasing Court efficiency and reducing delays in the Court were reasons for the Review Group on the Resource Management Bill favouring mediation (Baylis, 1992, p. 143). In 2001 these reasons still remain, with

mediation now being promoted by the Court as a means of alleviating caseload pressures (MfE, 2001d, p. 5).

Rebuilds trust between disputing parties

Frequently environmental disputes are caused by, or result in, a lack of trust between disputing parties. There can be a history of past violations of trust (Tenbrunsel, 1999). On their own, the parties may be unable to make the first step towards rebuilding trust. A mediator can be a 'trust facilitator' by assisting parties to communicate, listen to each other, express emotion constructively, and look beyond self interest and, in time, establish trust (Moore cited in Tenbrunsel, 1999, p. 10). Trust develops as people communicate and their intentions become transparent. It is not however quick or easy. Time and face-to-face interaction are seen as crucial (Tenbrunsel, 1999, p. 8). Once trust has been re-established then solutions are possible (Applbaum, 1987, p. 280). Repeated exposure to the same negotiators or mediators is considered to encourage a climate of trust (Tenbrunsel, 1999).

Impacts personal lives

Entry into mediation has personal benefits for the participants as the dispute is dealt with and no longer dominates their lives. It can be therapeutic for participants to vent their emotions and express their viewpoints directly to the other parties (Eisen, 1998).

3.3.2 Limitations of environmental mediation

Despite the many proponents of mediation, there are those who question its use. Some of the perceived limitations of mediation are:

Unrealistic expectations

In some circumstances mediation of disputes is considered undesirable or unrealistic (Cormick cited in Lake, 1987; Amy 1987). Limits exist where there is inflexibility, where interests can only be met at the expense of the other party, or where parties believe they have alternative forums in which to pursue their interests. Win/win solutions may not be possible (Burgess *et al*, 1995, p.3). One New Zealand mediator (pers.comm.) considers that win/win is promulgated only in the textbooks. Over time they have come to believe that it is a 'mostly ok/mostly ok' process. Most parties have to give something away (Powell, 1999, p. 456). In some circumstances litigation may be a more effective option (Bingham cited in Crowfoot *et al*, 1990, p. 5). There is also an

underlying assumption that the parties are good judges of what the real issues are and whether they are resolved adequately (Bingham cited in Lake, 1987, p. 316). This may not, in fact, be the case.

Potential disregard of the public interest and democracy

Confidentiality is considered necessary for mediation, but therefore means mediation is hidden from the public view. In mediation regulatory agencies potentially become unaccountable and loose transparency (Harrison, 1997, p. 88). The desirability of mediation where a dispute has a significant public interest or public law aspect has been raised (Somerville, 1997, 1996, p. 10; Milligan *et al*, 1998, p. 35; Sakar, 1998, p. 33; Boule, 1999). Concern has been expressed at public interest issues being debated and trade-offs made in a confidential process (Hardie, 1997). Environmental issues could be considered of interest to the public. For that reason UNECE has stated that there should be legal guarantees that proceedings are fair, open, transparent and equitable (UNECE, 1996, p. 35)

People coming to the Court with bona fide public interest concerns could be considered to be rendering a public service (Rosencranz *et al*, 1995, p. 325). Some can make a significant contribution in environmental issues. However, the cost and complexities of participating in hearings can be a deterrent (Randerson, 1995, p. 15). Where there is no public funding for persons or groups who represent the public interest that input is lost (Hardie, 1997). In New Zealand, the lack of legislative requirement to consider the public interest, as under the RMA, could be considered to further reduce expression of the public interest (Sheppard 1997; Milligan & Turley, 1998; Trenorden, 1997; Tow & Stubbs, 1997).

Maintaining inter-generational equity is also a concern (Blackford, 1992). There is a danger that the present generation will disregard future generations on account of its

...inherent bias towards its own well-being, and if conditions appear threatening, may well abandon its sense of *noblesse oblige* towards the well being of future generations. (Brown Weiss, 1995, p. 231).

The mediator

The mediator is seen as crucial for the success of mediation. Historically, mediators received informal training. However, during the 20th century, mediation has been institutionalized and become a profession (Moore, 1996). Training, credentials and a

code of ethics to produce competent and effective mediators have been advocated (Davis *et al* cited in Boristoff *et al*, 1998, p. 23; Stein 1997; Hardie, 1997; Manring *et al*, 1990; Cooley, 2000). It is considered that participants in mediation are entitled to certain minimum standards being met (Stein, 1997, p. 3). Some writers go so far as to state that parties should only mediate where the mediator has the trust and confidence of all parties (Fowler cited in Bollard *et al*, 1998). How this is to be ensured is unclear.

The approach and style of mediators may vary, depending on their objective or focus in mediation and their perception of their role in the process (Newman, 1999; Levin, 2001). A mediator may choose to pursue one of a number of strategies when managing mediation: compensation, pressure, integration or inaction. The particular strategy chosen is determined by the mediator's perception of the situation, including the probability of a settlement being reached, and how much value he/she puts on the parties achieving their aspirations (Carnevale cited in Noll, 2001).

The type of dispute resolution and the nature of the dispute can determine the particular mediator used (Kovich & Love 1998 cited in Noll, 2001). Some qualities considered necessary in mediators are skill, wisdom, political insight, fairness and commanding respect (Blackford *et al* cited in Blackburn *et al*, 1995, p. 198). It is considered that effective mediators are those who are sensitive to and aware of cross-cultural and inter-cultural issues (Hauser & Kelter cited in Boristoff *et al*, 1998, p. 23).

The lack of accountability of the mediator has been raised as a concern. Local authority decision-makers are accountable to constituents, the Court to the law, but mediators are accountable to no one. They may be biased in favour of achieving a settlement or a particular party (Harrison, 1997, p. 95). Amy (1987) has suggested that mediators may have an interest in securing a settlement. Challenges from the parties and self-interest in retaining their professional reputation are considered to be a disincentive to showing bias (Amy, 1987; Harrison, 1997, p. 96). Mediation is a private process and mediators need to conduct themselves appropriately. Naughton QC (1995) considers

If mediation is court-related it enables, and probably obliges, the Court to maintain some degree of quality control over mediator personnel and the mediation process (Naughton cited in Keogh, 1996, p. 176).

This quality control can extend to mediator selection, training, supervision of their conduct and accountability for their conduct (Naughton, 1995, p. 381). In Australia, the NSW Law Reform Commission recommended that ‘dispute resolution programs connected with courts and tribunals must operate in accordance with clear guidelines (...) to ensure the integrity of the process and quality of service’ and ‘...require mediators to undergo appropriate training in dispute resolution techniques as a condition of their employment’ (Naughton, 1995, p. 384). LEADR⁸ and AMINZ⁹ have procedures in place to maintain standards of their registered mediators. These standards do not apply to mediators outside these organisations (Powell, 1999, p. 21).

Dangers inherent within the mediation process

- Co-optation or conversion

This occurs when a party is encouraged to change their stance to that of the majority or, by virtue of the discussion and its persuasive power, change their opinion. Where this happens the constituents or organisation they represent, who has not heard the opponent’s viewpoint, may feel betrayed by their representative and find a replacement (Burgess *et al*, 1994, p. 3, 7).

- Coercion

To coerce someone means to ‘persuade or restrain (an unwilling person) by force’ (Concise Oxford Dictionary). While entry into mediation and participation in mediation is said to be voluntary, and there is no legal compulsion to participate, people may feel coerced into participating. A coerced settlement is not considered to be a ‘quality settlement’ and can perpetuate injustices, leading to dissatisfaction and further conflict (Adler cited in PCE, 1996, p. A51; Naughton, 1995, p. 380). Pressure is imposed by:

(a) The perception that the Judge considers the case is suitable for mediation and is advising the parties to settle. There could be a temptation for ‘...busy overworked judges, disinterested ones, or even well-intentioned but nevertheless over-zealous ones, to subtly (or unsubtly) pressure the parties to use mediation’ (Naughton, 1995, p. 381).

⁸ LEADR: Leading Experts in Alternative Dispute Resolution, previously known as Lawyers Engaged in Alternative Dispute Resolution. An Australasian non-profit membership-based organization established in 1989 to promote the use and awareness of alternative dispute resolution. It has accredited mediators, offers a referral service and conducts training in mediation (MfE, 2001, p.28).

⁹ AMINZ: Arbitrators and Mediators Institute of New Zealand. It is a not-for-profit incorporated society that represents the New Zealand profession of arbitration, mediation and dispute resolution generally. It has a panel list of suitably qualified and experienced mediators (MfE, 2001, p.28).

- (b) Other parties agreeing to mediate, which leaves the party that refuses as 'the odd man out'.
- (c) The potential for parties to gang up in Court against the party that did not wish to mediate and seek costs. Seeking 'security for costs', or advising that costs will be sought could be considered a form of coercion.
- (d) 'Sponsors', such as legal aid organisations, requiring that mediation be attempted.

This less than voluntary situation is not necessarily viewed as undesirable as 'the process is often useful and initially unwilling participants can be surprised at what happens.' (Bevan, 1992, p. 30). It does however go against the fundamental right of the individual to choose. During mediation, parties may feel forced to compromise and accept the mediated settlement. Being forced to accept an agreement can create resentment and cause a backlash as parties then work to reverse the situation at the next opportunity (Burgess *et al*, 1994, p. 6).

- Power imbalance

Parties have varying degrees of power that can be used to influence the outcome of mediation (Powell, 2000). A power imbalance may exist where there is: inequality of the parties with respect to financial resources, social position, access to expertise and knowledge, legal legitimacy, precedent and negotiating ability (Tillet, 1991, p. 143; Blackford *et al*, 1991, p. v; Harashina cited in PCE, 1996, p. 8; Cooley, 2000, p. 78; Powell, 2000, p. 420). Unequal access to expertise may advantage parties and give them a stronger position in negotiations (Amy cited in Blackford *et al*, 1995, p. 189). This may create an 'intellectual environment' that impacts on the parties' willingness to participate (Grant, 2001, p. 80). A power imbalance may also arise as a result of physical intimidation and an unequal desire to avoid conflict (Cooley, 2000, p. 78), or create nuisance (Powell, 2000, p. 420). The informal nature of the process can create the impression that the parties are equal when they are not. The mediated agreement may look equal but is in fact an unequal compromise (Kubasek *et al*, 1996, p. 62). The less resourced party may have lacked experience of the process, or resources (legal and technical) to review information or obtain their own (Harashina cited in PCE, 1996, p. 8; Adler *et al*, 2000).

The mediator may be able, by ensuring the process is procedurally fair, to influence some factors but not completely redress the imbalance. Fundamental power differentials may exist within a society and participants may not be able to overcome these e.g. Government participants have influence conferred by the political or economic system (Blackford *et al*, 1995, p. 188). It is suggested that, if the power imbalance is too great and cannot be redressed, the mediator should refuse to act (Cormick cited in Harrison, 1997, p. 100; Hardie, 1997, p. 4). As some opponents of mediation put it:

Mediation has turned out to be a dangerous instrument for increasing the power of the strong to take advantage of the weak. Because of the informality and consensuality of the process and hence the absence of both procedural and substantive rules, mediation can magnify power imbalances and open the door for coercion and manipulation by the stronger party (Rubin, 1994,p.22).

- Loss of visibility

Mediation is a confidential process and is ‘...not subject to the glare of publicity or press reporting.’ (AMINZ). This lack of publicity may impact on groups who rely on public exposure to attract funds necessary for their survival and effective operation (Crowfoot *et al*, 1990, p. 4). This loss of support may impact on an organisation’s ability to raise funds to pursue a matter in the Court. Involvement in symbolic conflict and ‘fighting for a principle’ enables parties to be seen as taking a position (Tillet, 1991, p. 11).

Citizens groups contending with powerful government agencies or large corporations often must take the hardest possible line- total victory- to keep the support of their members and maintain their momentum (Carpenter *et al*, 1988, p. 2).

- Lack of skills

Mediation is a demanding process that takes work, organization, clear thinking and stamina (Cormick cited in Crowfoot *et al*, 1990, p. 5). Parties that lack knowledge of, and experience in, negotiation or bargaining may, when faced with highly experienced and sophisticated opponents, compromise and accept unjust or undesirable settlements (Amy 1983; Forester, 1985; Crowfoot *et al*, 1990; Harrison, 1997; Blackford *et al*, 1995, p. 189). Sometimes the process breaks down when parties become entrenched in their positions (McKenzie, 1998) and become unwilling to alter their strategy or perspective (Burgess *et al*, 1994, p. 9). In the United States of America some organisations are teaching people how to mediate prior to an actual mediation occurring in order to teach people joint problem-solving techniques, such as packaging the options so as to make them attractive to other parties (Rundle, 1986).

- Pressure to settle

Putting a deadline on people to get them to resolve an issue can be counter productive. It may mean that time is not wasted through stalling but that the parties use the pressure they were under as an excuse for their ineffectiveness (Argyris, 1989, p. 546).

- Implementation

While mediation may work well for settling disputes, it does not necessarily result in higher rates of compliance and implementation by the parties (Sipe, 1998). It is considered that 'procedural satisfaction' is important if the outcomes of voluntary dispute resolution processes are going to last. Procedural satisfaction indicates that parties believed they were better served by using the voluntary process than fighting in Court and that they would use such a process again (Lincoln & Associates in Kartez *et al*, 1993).

3.3.3 Suitability of disputes for mediation

Some writers have sought to devise ways of working out which disputes are suitable for resolution by mediation. Three suggested categories are:

Category 1: Characteristics of disputes easy to resolve

The issue is divisible; the stakes are small; there is interdependence of the parties; there is continuity of interaction; there is strong, cohesive leadership; the third party is trusted, powerful, prestigious and neutral, and parties have done or could do equal harm to each other (Eunson, 1997).

Category 2: Characteristics of disputes difficult to resolve

The issues are a matter of principle; there is low motivation to settle; the stakes are large; parties are negotiating over scarce resources; there is no interdependence between parties; there is no ongoing interaction required between parties; parties are fragmented or without clear, strong leadership; the process is unbalanced with one party feeling the more harmed; there are numerous parties or difficulty in defining parties; or it involves industrial projects that revolve around complex scientific factors. In Australia research found that disputes with these characteristics had a 49% success rate in mediation (Eunson, 1997; Talbot, 1983; Tow & Stubbs, 1997, p. 278). Disputes with these characteristics are considered likely to defeat even the most able mediators (Kresel *et al* cited in Baylis 1999, p. 288).

Category 3: Characteristics of disputes unsuitable for mediation

The issues are vague and undefined; they involve deeply held values; are likely to set important nationwide legal precedents and the issues lack deadlines or time pressures (Blackburn, 1995). It has been suggested that often, precedent cases will settle for money, whereas principle cases will not (Chornenki *et al*, 1996, p. 83).

While creating categories may be useful, they might not be an appropriate way to 'sieve' or predict disputes suitable for mediation, as in each situation unique characteristics came into play (Chornenki *et al*, 1996, p. 82). The issues in a dispute appearing unsuitable for mediation may be overcome due to the will of the parties to make the mediation process work (Bingham, 1987).

3.4 Models of mediation

Four models of mediation have been identified. They are:

- *Settlement* or compromise mediation. The main objective is to encourage incremental bargaining towards a compromise;
- *Facilitative*, interest-based or problem solving mediation. The main objective is to negotiate on the basis of needs and interests rather than positions;
- *Therapeutic*, reconciliation or transformative mediation. The main objective is to deal with the underlying causes of the dispute and improve relationships so resolution can be reached and
- *Evaluative*, advisory or managerial mediation. The main objective is to reach resolution based on the legal rights, entitlements and anticipated outcomes in court (Boulle *et al*, 1998, p.29, 30).

Each type of mediation has benefits and limitations. Facilitative mediation, considered appropriate for environmental disputes, is seen as the classic or pure form of mediation. Other forms of mediation may, however, influence mediators during mediation (Boulle *et al*, 1998). A mediator may provide reality checks for the parties but not assess or predict outcomes or urge settlement (Riskin cited in Noll, 2001). Another may define the case in terms of strengths and weaknesses of positions and give an opinion on the likely outcome of the case in Court. Giving advice is justified on the grounds that this avoids a settlement being drawn up which fails to comply with the legislation (Baylis, 1999, p. 283-4). The dangers with giving advice are that an opinion may be incorrect, could be used as a form of blackmail to get settlement or give the impression that the

mediator is siding with one party. This can destroy a party's trust in the mediator (Stein, 1997, p. 3; Kovich *et al* cited in Noll, 2001).

3.5 The process of mediation

Mediation practitioners and theorists agree that the mediation process requires a fairly prescribed format (Boristoff *et al*, 1998, p. 22) that has a proven capacity to work (Hardie, 1997). It requires public institutions and an institutional norm to ensure it occurs in a fundamentally democratic way among equals (Reed cited in Blackburn *et al*, 1995, p. 14). Without this, questions of legitimacy of the process can arise (Baylis, 1992). The public perception of the legitimacy of the process is considered important (Chart, 1988, p. 9; Baylis, 1992).

There are three generally recognised main stages in the mediation process with steps within each stage. The main stages and steps in mediation are:

Stage 1: Pre-negotiation

- Initiation

The mediator is identified (Blackburn, 1995, p. 270) and invited to participate. The mediator's objectivity is seen as critically important and technical expertise in mediation as very important (Blackburn, 1995, p. 270, 276; Saxe, 1997). Mediator styles are known to vary. Blackburn suggests that at this initiation stage the suitability of the dispute for mediation may be assessed (Blackburn, 1995, p. 271). Factors considered critically important are:

- That mediation is the best alternative and
- There is uncertainty as to the outcome in another context.

Factors considered very important are:

- The issues are concrete and specific;
- There is a perceived balance of power between the parties;
- A stalemate has been reached;
- There will be economic costs if mediation fails;
- No legal precedents will be set;
- There are no strongly held ideological or philosophical differences (Burgess *et al*, 1994) and
- There is no history of contentious relationships (Blackburn, 1995, p. 272).

It is also considered an appropriate time for the parties to prepare a dispute resolution strategy. During this, they define their objective; assess the appropriateness of environmental mediation for the dispute; evaluate its costs and benefits; consider options available for ADR and their BATNA¹⁰; decide their bottom line; choose the favoured option and consider implementation and review (Burgess, 1994; Blackford *et al*, 1995, p. 195). One writer considers that strategic preparation is a key to successful mediation and gives prospective mediation participants a worksheet to work through (Chornenki *et al*, 1996, p. 111-120). It is considered that parties who do not have a clear idea of the process and what they want from it are likely to be disappointed (Cormick cited in Crowfoot *et al*, 1990, p. 5).

- Recruitment

This requires the identification of the main and potential interest groups. The selection of participants is considered critically important with participants being representative spokespersons of clearly identifiable constituents (Blackburn *et al*, 1995, p. 271, 277; Blackford *et al*, 1995, p. 191). Adequate time has to be allowed for appropriate representation (Boulle *et al*, 1998; Blackford *et al*, 1995, p. 192; 270). A further consideration is whether or not the participants can maintain participation if it goes on over a period of time (Blackburn *et al*, 1995, p. 272). Participation must be on a voluntary basis. At this stage it is considered very important that the mediator educates the parties on the mediation process (Blackburn *et al*, 1995).

- Orientation

This covers the protocols and process design, costs, defining of the issues to be resolved and nature of any information to be gathered and exchanged (Blackford *et al*, 1995; Boulle *et al*, 1998; Crowfoot *et al*, 1990, p. 21, 22). Of critical importance are: the parties' participation in designing the process; the joint development of, and agreement to, ground rules; ground rules for dealing with the media and building trust between the mediator and the parties (Blackburn *et al*, 1995; Moore, 1996). The physical, intellectual and emotional environment of mediation is important as it can affect whether or not participants feel comfortable to contribute in discussion (Futrell, 1999; Grant, 2001, p. 80).

¹⁰ BATNA: Best Alternative to a Negotiated Agreement. WATNA: Worst Alternative to a Negotiated Agreement (Powell, 2001).

Stage 2: Negotiation

- Issue identification

The issues are identified, and the mediator endeavours to get the participants to give all parties an adequate understanding of the relevant facts (Blackburn *et al*, 1995, p. 277). The attitudes and concerns of participants are explained; different values and beliefs are identified and explained (Blackford *et al*, 1995). During this phase the hidden interests of parties may be uncovered, feelings expressed and parties, for the first time, explain their viewpoint to one another (Chornenki *et al*, 1990, p. 108). Issues are reframed in ways that recognise and respect the perspective of each party (Reed, 1995).

It is important that the mediator identifies the core issues in the conflict. Possible core issues are fundamental moral issues or distributional questions. Issues that may overlay these are misunderstandings, disagreement over technical facts, questions of procedural fairness and polarisation. These may obscure the core issues in the conflict and become so severe as to dominate the mediation (Burgess *et al*, 1994, p. 4).

- Options outlined

Parties are encouraged to brainstorm and think laterally without commitment to come up with possible options for settlement. Options are recorded but not criticised or evaluated as they are being generated. It is considered important that the options should come from the parties, not the mediator, and that every party contributes (Powell, 1999, p. 454; Grant, 2001, p. 79). The suggested options are then worked on and assessed. The parties may break into private sessions to work on and consider alternatives, consult others, such as head office, experts, or hold private sessions with the mediator (Chornenki *et al*, 1990, p. 109). During this stage a mediator's conduct can influence the parties willingness to engage in lateral thinking (Grant, 2001, p. 81).

- Bargaining/Negotiation

Bargaining occurs and decisions or agreements are recorded. It is considered of critical importance that any agreement reached, including agreements in principle, should be documented before the parties leave the session (Blackburn *et al*, 1995, p. 278). Alternatively, the mediator may, as the mediation proceeds, draft an agreement based on how they perceive key interests for the parties to criticise rather than to commit to. It is reworked, the previous copy is destroyed and a revised agreement made (McKenzie, 1998). Drafting possible agreements during the session enables acceptable language to

be worked out with the parties present (Chornenki *et al*, 1990, p. 109) and the settlement drafted. At this point parties may consider and try the other powers available to them such as Court action, lobbying, or economics, e.g. financial settlement with side agreements (Burgess *et al*, 1994, p. 3).

- **Drafting and Signing of Agreement**

The agreement is then finalised and signed (Moore, 1996; Blackburn, 1995; Boulle *et al*, 1998). It has been suggested that at this stage the mediator needs to 'reality check' the agreement 'what if...' so that parties are aware of the implications of their settlement. The mediator needs to ensure that the heads of agreement are accurately recorded and reflect the needs and wishes of the parties. Failure to accurately record the proposed settlement may mean parties are unwilling to sign the agreement or dispute the wording. There may be a danger to rush this stage in order to finalise an agreement. An adjournment, ranging in length from hours to weeks, would enable time for parties to reflect on the proposed settlement (Case note, NZLJ 1999, p. 455; Powell, 1999, p. 454; Pollard, 2000).

Stage 3: Implementation

The parties undertake implementation and, if necessary, it is ratified or approved by the people represented in mediation (Blackburn *et al*, 1995, p. 279). It may also be necessary to review the settlement if circumstances require it (Blackburn *et al*, 1995; Boulle *et al*, 1998). Implementing and monitoring agreements can be included in the settlement but it has been noted that often monitoring is not built in, due to the rush to finish the agreement, participant burnout and lack of funds (Manring *et al*, 1990).

3.6 Prerequisites for mediation

There is a wide range of mediation styles and practices (Forester 1989; Blackburn *et al* 1995). There was no definitive list but rather there appeared to be a range of key requirements that were considered important by a number of writers (Bingham, 1986). It is considered that these prerequisites should either be present or be put in place before the parties engage in the actual mediation. The mediator may be instrumental in fostering these prerequisites (Poitras *et al*, 1997, p. 37). The necessary prerequisites are described in the following way:

Voluntary participation

Participants are assumed to be there of their own free will and are willing to resolve the dispute (Poitras *et al*, 1997, p. 33). No one has to consent to mediation and parties can walk away or withdraw at any time (Bevan, 1992, p. 27-8; Fisher *et al*, 1999).

Face-to-face discussion

Face-to-face discussion enables understanding of others' concerns, interests and viewpoints to develop (Susskind, 1985, p. 372). It causes participants to leave their familiar, day-to-day situation and focus on the issues (Hardy cited in Eisen, 1998). It may restrict the number of people who can be involved (Hayward, 2000, p. 226). The use of cyberspace for mediation has been promoted in the United States but this has a number of inherent limitations, one of which is face-to-face contact (Eisen, 1998; Blackford, *et al*, 1995).

Mutual agreement or cooperative decisions

All affected parties join in defining the issues, developing alternatives and outcomes that satisfy the parties (Poitras *et al*, 1997, p. 34). All are searching for joint gains (Susskind, 1985, p. 372-3).

Third party entry and role in facilitating negotiation and consensus building

The mediator should ensure that the rules of natural justice apply (Boulle *et al*, 1999). Key requirements are: the mediator ensures all parties are heard; shows no bias; is honest; has integrity; ensures that the process is fair; ensures that any settlement reflects the agreement between parties (Orchiston, 2000, p. 6) and parties are not forced into a settlement.

Authority to implement the agreement

Those with the authority to implement the agreement participate directly in the process (Susskind *et al*, 1987; Cormick 1987; Crowfoot *et al* 1990; Blackburn *et al*, 1995). Some writers extend their work to cover matters such as implementation and renegotiation (Bingham, 1986; Susskind *et al*, 1987; Sipe, 1998).

The parties are open and flexible

The parties are flexible and able to recognise aspects of the dispute beyond themselves and their interests (Chornenki, 1996, p. 84). Parties must at least try to be objective

enough to understand other points of view. This can be difficult as environmental disputes often involve strongly held or entrenched views (Sakar, 1998, p. 33). Parties may have prejudged or exaggerated their opponents' viewpoint and openness to accepting the reality is difficult (Morris *et al*, 1999) as they have negative expectations (Tenbrunsel, 1999).

Confidentiality

Mediation is described as a confidential process (Boulle *et al*, 1998, p. 276-7) with only the agreed outcome being revealed. Confidentiality is considered to be one of mediation's greatest assets (Goldblatt, 2000, p. 392) in that:

- It allows parties to share freely, and make concessions or compromises in an endeavour to reach a mutually acceptable outcome, without political and public pressure.
- If mediation fails and the dispute goes to Court, information divulged in mediation cannot be used against parties in the court process (Boulle *et al*, 1998).
- It protects mediators as it excludes them from pressure to divulge details of the mediation, both during and after mediation (Boulle *et al*, 1998).

Some writers suggest that a formal agreement about confidentiality should be reached prior to mediation. The AMINZ provides a suggested Memorandum of Confidentiality for parties to sign prior to mediation (AMINZ). At the end of mediation, some mediators may collect and destroy all notes made during mediation or return all documents relating to the mediation to the participants. Others indicate that no reports or notes are made on the file regarding the mediation (Stein, 1997).

Fairness

'The perceived fairness of public participation procedures can affect public satisfaction as much as the substantive nature of the resulting decision' (Lawrence, Daniels & Stankey, 1997, p. 578). Fairness can therefore be as important as efficiency. Concerns over fairness can cause some parties to reject valuable offers that are perceived to be inequitable. Fairness is not always construed as equality. Differing backgrounds and perspectives lead to differing perspective of fairness (Morris *et al*, 1999).

Procedural fairness is seen as a component of environmental justice (Sheldon cited in Bosselmann *et al*, 1999, p. 26). Procedural justice considers that the manner in which public involvement is conducted can affect public reaction to the subsequent decisions.

The use of information by decision-makers and feedback to participants is seen as important in creating the perception of fairness. People become unwilling to participate where procedures are perceived as unjust or unfair (Lawrence *et al*, 1997). Factors that enhance the perception of fairness are: equality of opportunity, following consistent rules, basing decisions on accurate information, avoiding bias; responsive regulatory authority; representation at all stages and ethicality (Leventhal cited in Tata, 2000; Justice, 2001). The process must be procedurally fair and perceived to be fair in order for settlements to be accepted and a commitment made to implement them (Tyler & Lind cited in Morris *et al*, 1999).

3.7. The permanence or otherwise of mediated agreements

One issue, which finds limited coverage in the literature but which has the potential to be of increasing importance, is the permanence of any mediated agreements. Of importance is whether mediated agreements will stand the test of time or lead to grievance claims from future generations (Matunga, H., pers. comm.) and whether there is the need or opportunity for renegotiation or flexing in the future as circumstances change and new information regarding some activities comes to light (Mitchell, 1997).

The circumstances in which agreements may be reviewed in light of new information, such as technological findings that raise serious inter-generational or ecological issues, do not appear to have been covered to any degree. This does, however, need to be addressed as the limited scope for review determines a party's approach to mediation.

3.8 Conclusion

In the above review I have examined the recent literature on environmental mediation from several different perspectives. Against the backdrop of this literature review, the focus of this study is on evaluating environmental mediation under the umbrella of the Environment Court within the framework of the RMA. As explained in the next chapter I will examine two particular aspects of the environmental mediation process:

1. How the process of environmental mediation is initiated, how it is conducted and how the settlements are implemented and
2. The extent to which the prerequisites for successful mediation are being met.

Chapter 4: Research Methodology

4.1 Introduction

This chapter describes the research procedures that were followed in order to address the objective of this study: to evaluate Environment Court assisted mediation of environmental disputes and develop good practice guidelines that would improve mediation. As stated in Chapter one the research objective was redefined in terms of key research questions as follows:

1. What are the relative advantages and disadvantages of mediation as a means of resolving environmental disputes?
2. What are the requirements of the mediation process in order for it to be an effective tool for resolving environmental disputes?
3. What are the provisions for mediation by the Environment Court under the RMA and how are these provisions being implemented?
4. What are the different stakeholder group's perspectives of the practice of Environment Court assisted mediation under the RMA?

4.2 Research approach

While the focus of my study was to evaluate the legislative provisions of s.268 (1) of the RMA as they relate to mediation and their implementation, it was by no means clear what should be evaluated. As Rossi and Freeman (1989) note, the effectiveness of any evaluation can be determined by the details (or lack of them) given in the authorising legislation as to the nature and implementation of a program, in this case mediation.

Usually ...only a set of general goals and some broad guidelines is authorised, while leaving the details of program design and implementation to the agency or organisation to whom the authority to run the program has been given.

It cannot be over emphasized that the specificity with which a program is designed is a key determinant of whether or not it will be effective, as well as how well its evaluation can be conducted (Rossi & Freeman, 1989, p. 116).

Such a situation could be considered to exist with regard to environmental mediation in New Zealand. The RMA has not defined the mediation process under s.268 and it has been left to the Court, and in particular the Commissioners who conduct mediation, to define and undertake the mediation process. Baylis (1999) has noted this lack of

specificity in New Zealand legislation and the implications of the resultant uncertainty and variation on the legitimacy of mediation in general. As there were no explicit criteria given within the RMA or supporting Environment Court or MfE documentation against which to evaluate the mediation process, I reviewed the literature to identify those criteria considered to be prerequisites for mediation and to develop these into a framework for evaluation.

Based on the literature review in the previous two chapters, I developed the following 'ideal type' criteria as a framework for the evaluation of Environment Court assisted mediation:

Parties' entry into mediation is voluntary.

Parties are competent to participate, i.e. informed and prepared for mediation.

On-going participation in mediation is voluntary.

The mediator upholds natural justice and the process is procedurally fair i.e.:

- Participants are involved in defining the process.
- An understanding of the process is drawn up.
- All parties have an opportunity to put their viewpoint.
- Power imbalances are redressed.
- Parties are given adequate time to consider proposals.
- A record of discussion is kept.
- There is no undue pressure on parties to settle.
- The agreement reached is a consensus decision.
- The memorandum of understanding is drawn up by all parties.

The parties are involved in face-to-face discussion.

The mediator is competent to undertake the mediation, i.e. knowledgeable and experienced.

Those with the authority to implement the outcome are present in mediation.

The outcome of mediation meets the purpose of the RMA.

The mediated settlement is a workable outcome that parties consider will last.

Participation in mediation results in time and cost savings.

4.3 Research methods

A range of research methods was used to answer the four research questions.

The relative advantages and disadvantages of, and prerequisites, for environmental mediation were identified from the literature review. Based on the

information obtained, a framework for evaluation was drawn up and used as a basis for preparing a series of structured interview questions for each stakeholder group. The main stakeholder groups involved in environmental mediation were considered to be the Environment Judges, Environment Commissioners and private mediators and participants, i.e. parties to a reference or appeal in the Environment Court. This last group may include Ministers of the Crown, government agencies, territorial and local authorities, commercial firms, public interest groups and private individuals. The stakeholders were identified, and if willing, interviewed using the structured interview questions (See Appendix 1).

The purpose of the structured questions was to examine the particular role of each stakeholder group within the mediation process and to ascertain whether or not the prerequisites for mediation, as listed above, were present in the Court assisted mediation process. Questions were also included so as to obtain each stakeholder's perspective of mediation under the RMA and any improvements they considered necessary or desirable. Personal interviews were conducted, in all but one case, using the structured questions, copies of which were given to stakeholders immediately prior to the interviews. Responses were taped, transcribed and the results were collated and analysed. Meaning was taken directly from the responses.

4.4 Research sample

The aim was to conduct the study nationwide. The small size of New Zealand and the limited number of Environment Judges and Environment Commissioners meant that it was possible to survey the Judges and Commissioners relatively easily. The small size of the groups to be sampled did, however, have implications for confidentiality and anonymity.

My goal was to get honest feedback on the Court assisted mediation process. I recognised that confidentiality and anonymity were of paramount importance on account of the potential to identify stakeholders. Some stakeholders relied on the Court for employment while others would be required to use the Court's services in future. It was considered that all would be unwilling for their responses to be published if this, in any way, enabled them to be identified. All individuals were therefore interviewed on

the condition that their participation would be kept confidential and their anonymity preserved (See Appendix 2).

Confidentiality and anonymity were also a consideration when writing up my findings. The systematic utilization of references, such as Judge A, Commissioner B or participant C, may enable a reader to build up a profile of a particular stakeholder that may enable identification. This had implications for the way in which results were presented. I therefore sought to summarise and report stakeholder responses in a random way to protect their confidentiality. All participants were given the opportunity to withdraw from the research at any time, including withdrawal of any information they had provided.

Systematic sampling was used to collect data for this research. Stakeholder groups subject to systematic sampling were as follows:

Environment Judges and Alternate Environment Judges

This was a small group with only six nationwide at the time of interviews (2000). I approached all Judges and, in addition to their willingness to participate in a personal interview, their availability for an interview was also dictated by Court schedules, locational considerations and their personal commitments within and outside New Zealand. Four Judges were interviewed personally.

2. Environment Commissioners

It was recognised that there were a number of individuals offering mediation services in New Zealand. In addition to the Environment Commissioners and Deputy Commissioners who conducted mediation in the Court, there were privately employed, trained mediators, professionals and, in some of the larger local authorities, officers with training and qualifications in mediation. It was decided to restrict the study to Commissioners operating as mediators within the Court-assisted mediation system. Reasons for this decision were:

- i. Commissioners were a defined group and operated under the Court's authority. Private mediators were a more diverse and geographically dispersed group, did not have access to the Judges in the same way as Commissioners and did not have the experience of determining cases as provided for in s.265 (3) of the RMA.

Confining the study to Commissioners enabled it to be kept manageable and realistic within the existing time and financial constraints.

ii. The Court assisted mediation process came under authority of the Court and was administered by the Court.

I approached all Commissioners and sought their participation in a confidential personal interview. As with the Judges, in addition to their willingness to participate, their availability for an interview was also dictated by Court schedules and personal and professional commitments within and outside New Zealand. I was able to obtain representation from male and female Commissioners who acted as mediators. The sample comprised eleven of the thirteen Commissioners.

3. . *Participants*

I did not consider it appropriate to randomly select cases that had been mediated, rather the cases needed to be representative of resource management cases in New Zealand. The criteria I used were:

Category of dispute: Plan reference/resource consent.

Location: Urban/rural; North Island/South Island

Cultural: Maori interests/Pakeha interests

Number of parties present: Single/multi-party.

All participants in a settlement were willing interviewees.

The selection of participants (i.e. parties to a reference or appeal) chosen to interview is explained below.

4.5 **Modifications to the research**

I had to modify my approach to locating references or appeals that had been resolved in Court assisted mediation. The Court was unable to provide a list of all cases that had been resolved by mediation. I approached all Commissioners, who were willing to be interviewed, and asked for the names of cases in each of the references or appeal categories. Only one Commissioner responded, listing one case. I informally approached some regional and local authorities regarding the resolution of appeals and references by Court assisted mediation. It became apparent that a number of regional and district/ city councils sought to negotiate appeals and references without Court assistance. The Court had noted this tendency (Bollard *et al*, 1998, p. 711). Sometimes

these negotiations were referred to as 'mediation' as a Council officer trained in mediation had chaired the session. Some Council's had been able to dispose of the majority of plan references in this way. I therefore used publicly available case summaries to locate cases that had been resolved by mediation.

A further constraint was that I needed to receive a positive response from all the parties who were parties to a mediated settlement. If any party to a settlement declined an interview, the case was discounted. Some parties approached did not wish to be interviewed and some did not respond. No attempt was made to find out the reason for declining. Willing participants were located in cases that covered the following criteria:

1. *Nature of the dispute:* Plan policy/resource consent
2. *Location:* North/South Island; Rural.
3. *Cultural:* Maori and Pakeha interests.
3. *Number of parties present:* Multi and single party.
4. *Individual, community/ interest groups*
5. *Regional and local authority.*

The total number of parties to a reference or appeal in the Environment Court interviewed was ten. They comprised male and female, regional and district council representatives, iwi, interest/ community group representatives and individuals. A second interview was conducted with two participants, seeking their view regarding a second later mediation conducted by the same mediator. This was done in order to determine the way in which the earlier mediation impacted the later mediation, in particular if it had built trust among the parties and the mediator (Tenbrunsel, 1999).

4.6 Data collection

To obtain the background information necessary to undertake the evaluation I used primary and secondary data sources. My primary source of data on the way in which Court assisted mediation was willing participants from the various stakeholder groups. I used secondary sources such as published reports, to find out the nature and extent of mediation. Data collection did impose limitations on my research.

4.7 The extent of mediation

It was assumed that the Court held information on all cases where mediation was attempted and that those records would enable the extent of mediation and nature of the dispute to be identified. This was not, in fact, the case.

Within the various Court regions, Judges recorded the outcomes of mediation in different ways. Some gave each Consent Order or Memorandum of Understanding a decision number. It therefore became a published decision. Other Judges did not follow this practice. A Consent Order or Memorandum of Understanding remained within the Court file system and interested members of the public would require the Court-given RMA file number or the name of the parties in order for the Court staff to access a copy of the mediated agreement. If the parties had requested that confidentiality apply to the Consent Order or Memorandum of Understanding then there would be no record of the agreement available to the public.

It was estimated that it could take at least a week to manually extract the data I sought from the 3000+files held in the Court Registry in Wellington and its associated storage facilities in Lower Hutt. Manual searching was potentially of limited value, as it may not reveal those cases where mediation had been used, unless such information had been noted on the file, in the Consent Order or Memorandum of Understanding. The Court had set up a system of recording the details of mediated cases in November 1999 but it became apparent during the interviews that it did not enjoy the full support of Commissioners and was not being used consistently. This has subsequently been confirmed by the Court.

It was recognised that there were a number of ways in which cases could be resolved, including complete or partial resolution (e.g. narrowing of issues) through mediation; using Court provided or private mediators; private settlement (e.g. negotiation) or withdrawal by one or other party. It was acknowledged that such information would give a valuable insight into the extent of environmental mediation in New Zealand. However, given the aforementioned difficulties in obtaining such data, this matter was not pursued.

4.8 The interview process

All but one interview was carried out in person. The telephone interview was necessary due to time and travel constraints. The stakeholder in the telephone interview was sent the questions prior to the interview. All stakeholders were given the opportunity to withdraw from the interview at a number of points including just prior to the interview. All were given the questions at the start of the interview and interviews were taped and transcribed (except the phone interview) with their agreement. Where stakeholders gave

unsolicited comments these were noted. If participants wished to make 'off the record' comments these were not recorded or noted. Comments were deleted if participants so wished. Answers given and comments made in response to the structured questions were used in the analysis.

Assumptions made regarding interviews

The assumptions I made in undertaking the interviews were that settlement could be taken as a measure of success; participants would, on account of confidentiality and anonymity of the details of the interview, feel free to be honest regarding their experience and perception of Court assisted mediation and meaning could be taken from the discursive text.

4.9 Limitations of the research

There were limitations in restricting the research to a relatively small number of participants in settlements mediated by Commissioners. It was recognised that private mediations would not be covered. Matters to explore within the context of private mediation were: how the mediator was selected; whether the fact of paying for the mediator increased participants desire to settle; what pressure this put on the participants and whether or not this impacted on the quality of the settlement. These questions require investigation, particularly if the Court should, in time, cease to fund a mediation service.

A survey of 'unsuccessful' mediations would also provide valuable information as to why mediation failed and could confirm or disprove the necessary prerequisites for 'successful' mediation. The surveying of participants from Court and private, successful and unsuccessful mediation may validate the observations made by a sole participant in this study.

Chapter 5: Court Assisted Environmental Dispute Resolution Under the Resource Management Act 1991

5.1 Introduction

This chapter explains the legislative context within which the mediation of environmental disputes occurs in New Zealand. It looks in particular at the provisions for mediation by the Court under s.268 of the RMA and the extent to which mediation is being used.

5.2 Mediation under the RMA

The way in which the mediation of environmental disputes is undertaken and the extent of its use in New Zealand have been influenced by a number of factors.

5.2.1 *Provision in the legislation*

The RMA provides a regulatory and administrative framework for the use, development and protection of natural and physical resources (Williams, 1997, p. 60). It has set up procedures for public participation in decision-making relating to these resources (PCE, 1996, p. 2; Woods, 1997, p. 37). It gives statutory authority to national, regional and local authorities to draw up policy statements and plans that promote the purpose of the Act as set out in s.5. Provision is made for public submission on these statutory instruments¹¹ and the hearing of these submissions¹². The RMA has open standing provisions that allow people to participate (PCE, 1996, p. 45). The decisions of regional and local authorities may be referred to the Court for reconsideration¹³ (Milne, 1996, p. 58-60).

The RMA also gives regional and local authorities quasi-judicial powers to grant or refuse applications for consent to use or develop resources (Williams, 1997, p. 33;¹⁴). Where an application for consent is publicly notified¹⁵ the public may make submissions to the consent authority¹⁶. Consent hearings are public and written

¹¹ Sections 48,49 RMA; First Schedule Part I & Part II; The Resource Management (Forms) Regulations 1991, Part I;

¹² Section 50; First Schedule, Part I & Part II, Clause 8 RMA

¹³ Cl.14 (3) First Schedule of the Act

¹⁴ Part VI RMA

¹⁵ Sections 93,94

¹⁶ Section 97

decisions are made public¹⁷. Where a decision, or its terms and conditions, are disputed, any party who made a submission may appeal that decision to the Court¹⁸. The PCE has noted that the Court process is expensive, adversarial, and not conducive to finding solutions that incorporate concerns of all interested parties (PCE, 1996, p. A14).

The Court, until 1996 known as the Planning Tribunal, was constituted under the RMA. It is a court of record¹⁹ (s.247) that exercises special and limited jurisdiction as defined by the RMA (Mulholland, 1990, p. 106). The RMA is ‘...part of a legislative trend to state broad principles of national policy rather than to attempt to prescribe detailed rules of conduct in statutes’ and ‘...lays down the overriding purposes and principles of the Act in Part II’ (Williams, 1997, p. 32). It was left it to the Court to interpret and, in the case of references, appeals, inquiries and declarations, apply the law (Williams, 1997, p. 32,33). The Court has the powers of a District Court in its civil jurisdiction. These powers relate largely to procedural rather than substantive matters²⁰. The Court is both adversarial and inquisitorial in style (Mulholland, 1990, p. 106). It is free to develop its own procedures so long as they are fair and efficient²¹. These centre on inquiry into the actual or potential effects on the environment (Bollard *et al*, 1998, p. 709). The Court can receive or call for any evidence it thinks fit and is not bound by the rules of law about evidence²². Parties are not required to have legal representation²³ (Sheppard, 1997). Hearings are public unless special circumstances require a private hearing²⁴. A hearing before the Court may be adjourned so that mediation, conciliation or other procedures can occur. The hearing may be resumed (Bollard *et al*, 1998, p. 709).

All decisions by the Court are final²⁵ unless they meet the review conditions of s.294 or s.295. Any party to the Court proceedings may appeal a decision on a point of law to the High Court²⁶. Every decision, determination, or order, unless it is an oral decision, must be in writing²⁷. It is usual for the Court’s determination to be accompanied by a

¹⁷ Section 100,101

¹⁸ Sections 120,121,271A.

¹⁹ A court whereof the acts & judicial proceedings are permanently recorded & which has power to punish for contempt of its authority. *Butterworths New Zealand Law Dictionary*, Spiller, 4th ed. 1995 p.76.

²⁰ Section 278

²¹ Section 269

²² Section 276

²³ Section 275

²⁴ Sections 277, 279 (3)

²⁵ Section 295

²⁶ Sections 299

²⁷ Section 297

reasoned decision. 'The reasoned judgment helps to ensure not only that justice is done but that it is seen to be done' (Mulholland, 1990, p. 107).

The Court consists of Environment Judges, who are also District Court Judges,²⁸ and Environment Commissioners²⁹. Judges are appointed by the Governor-General, on the recommendation of the Minister of Justice after consultation with the Minister for the Environment and the Minister of Maori Affairs³⁰. Judges hold office until age 68 during good behaviour, or until they resign or are removed from office under the RMA³¹. At any one time there are to be no more than eight Environment Judges holding office³². Alternate Environment Judges may be appointed³³.

In New Zealand the independence of the judiciary from political interference and influence is maintained by the Constitution Act 1986³⁴, appointment procedures and conventions (McDowell & Webb, 1995, p. 253-255). The Beattie Report of 1979 suggested a Judicial Commission to appoint judges. Such a Commission was intended to make the process more visible to the public to promote its legitimacy. However this was not adopted (McDowell *et al*, 1995, p. 270). It is assumed that the appointment of judges to the Environment Court is on merit and interest rather than political influence.

Environment and Deputy Environment Commissioners are appointed by the Governor-General on the recommendation of the Minister of Justice after consultation with the Minister for the Environment and the Minister of Maori Affairs. There is no statutory process for the appointment of Commissioners and Deputy Commissioners. The Cabinet Office Manual sets out the steps all ministers must take before advising the Governor-General to make appointments³⁵. Ministry of Justice (MoJ) on behalf of the Minister of Justice administers the appointment process. The positions are not publicly advertised, with candidates being identified in a number of ways. Interested people may write directly to the Minister or the Ministry of Justice (MoJ, 2001). The Court endeavours to attract Commissioners from a variety of professions and experiential backgrounds so as to represent the broader public interests of the community at large

²⁸ Section 249

²⁹ Section 248

³⁰ Section 250.

³¹ Section 258

³² Section 250 (3)

³³ Section 252

³⁴ Section 23,24

³⁵ Current requirements are at Cabinet Office website: www.dpmc.govt.nz/cabinet.

(Palmer cited in MfE, 1988,p.37). It is suggested that this enhances the acceptability of decisions on appeal (Williams, 1997, p. 32). Therefore the Minister may seek nominations from Ministerial and/or Parliamentary colleagues to obtain a wider range of candidates. If particular professional skills are required, the Minister may seek nominations from certain professional groups. The Minister would look for a mix of skills and representativeness in candidates (MoJ, 2001).

The criteria for Commissioner appointment have been divided into three categories: statutory requirements, qualities of character and personal technical skills and knowledge. Under statutory requirements the Minister of Justice considers, among other things, whether a person has knowledge and experience in alternative dispute resolution processes (MoJ2001). Section 253(da), which was inserted into the legislation by s.8, Resource Management Amendment Act 1996, does not specify these processes. The personal technical skills and knowledge specified in the Position Description include mediation skills. Qualities of character include, among other things, personal honesty and integrity, impartiality, open mindedness and good judgement³⁶. The Minister would normally consult the Principal Environment Judge. Candidates are not interviewed for the position (MoJ, pers.comm. 2001). Commissioners and Deputy Commissioners can resign from office or may be removed from office by the Governor-General for inability or misbehaviour³⁷.

A Commissioner is appointed for a term of five years and may be reappointed any number of times. When the term of office expires, it is the Minister's decision whether or not to reappoint the Commissioner, taking into account the views of the Principal Environment Judge and any gaps in the skills and representativeness of Commissioners (MoJ pers.comm. 2001). There is no limit placed on the number of Commissioners or Deputy Commissioners who may hold office³⁸. A Commissioner or Deputy Commissioner must, before commencing duty as a Commissioner, take an oath of office that 'he or she will honestly and impartially perform the duties of the office'³⁹. As mediation takes place under the jurisdiction of the Court, there is an obligation for Commissioners to act in good faith (Bollard *et al*, 1998, p. 710). Members of the Court have protection from legal proceedings if they acted in good faith in the performance of

³⁶ Environment Commissioner/Deputy Commissioner position description, Ministry of Justice.

³⁷ Sections 257 and 258

³⁸ Section 254

³⁹ Section 256

their duties⁴⁰. It is assumed this protection applies to all Commissioner duties, including those of mediator. It appears that the protection applied to Commissioners does not apply to a private mediator who might undertake mediation at the Court's request (Bollard *et al*, 1998, p. 712).

The use of alternative dispute resolution is provided for in s.99 and s.268 of the RMA. In s.99 Pre-hearing Meetings, mediation is provided for as a means of resolving environmental disputes at the regional or local authority level, prior to a public hearing. It is not compulsory as the consent authority 'may' 'invite' participants to meet with others for '...the purpose of clarifying, mediating or facilitating resolution of any matter or issue'⁴¹. No formal mediation procedure is provided in s.99 (Sakar, 1998, p. 31). The term, Additional Dispute Resolution, has been used in s.268, and indicates that mediation is an additional form of dispute resolution, not an alternative to litigation. Under s.268 the parties retain their right to go to Court if they are not satisfied with the outcome of mediation (PCE, 1996, A49).

The PCE considered that there was no clear guidance in the legislation as to how sections 99 or 268 were to be applied (PCE, 1996, p. 67). As Baylis comments

Among some practitioners there is a kind of post-modern resistance to the notion that processes should be defined in any detail.... However, when mediation/conciliation is established as part of a statutory process of dispute resolution and can affect people's rights and entitlements under the law clarity and consistency are necessary (Baylis, 1999, p. 293).

Such a situation could be considered to exist in New Zealand where mediation has been incorporated into a number of statutes. Many of these have been passed since 1989 and give no guidance on fundamental process issues (PCE, 1996, p. 67; Baylis, 1999, p. 279, 290). There has been debate within New Zealand as to the desirability of mediation being incorporated into court processes in general, with concerns being expressed that ADR could '...deprive citizens of their right of access to justice, or subvert the traditional right of access to the courts' by directing parties into mediation rather than litigation (NZ Law Society (NZLS) in Mahoney, 2000, p. 226). Despite these reservations, mediation is being endorsed and promoted by some leading law firms, the courts and organisations (Dept. of Courts; MfE, 2001, p. 28). Some organizations favour 'court-filtered' mediation as opposed to court-annexed mediation. In court-

⁴⁰ Section 261

⁴¹ Section 99(1)

filtered mediation the Judge encourages mediation during court proceedings, and grants adjournments to allow that to happen, but leaves it to the parties and their legal advisers to initiate. There is no directive or compulsion to mediate (Mahoney, 2000, p. 226). At the time of interviews (2000) the Court appeared to be involved in both court-filtered and court-annexed mediation with Judges sometimes suggesting mediation during court proceedings (Bollard *et al*, 1998, p. 709).

Proceedings lodged with the Court may be treated in a number of ways:

- A party may withdraw the appeal or reference.
- The parties may negotiate an agreement. If the agreement relates to the proceeding, it must come before the Court. Side agreements, including financial incentives to settle, are outside the Court's jurisdiction.
- An Environment Judge may require parties to attend a conference⁴².
- With the parties consent or at their request, the Court may ask a member of the Court or another person to conduct mediation, conciliation or such other procedures which are designed to resolve the matter and encourage settlement⁴³.
- Parties may apply to the Court, under s.356, to have the matter settled by arbitration. Arbitration is at the Court's discretion and could be considered an anomaly, given the role of the Court.
- The matter may proceed to a hearing before the Court⁴⁴ that usually comprises a Judge and two Commissioners. It is a full re-hearing of the matter (*de novo*) '...uninhibited by what has gone before' (Spiller, 1995, p. 82). Under s.279, a Judge or Commissioner, where authorised by the Principal Environment Judge under s.280, may sit alone (Sheppard, 1998, p. 18). Where the Court sits the Judge presides at the hearing⁴⁵.
- At any time during a Court hearing, a Judge may of their own motion or at the parties request, ask a Court member or another party to conduct mediation, conciliation or some other dispute resolution procedure⁴⁶.

⁴² Section 267

⁴³ Section 268(1)

⁴⁴ Section 272

⁴⁵ Section 265

⁴⁶ Section 268(1).

5.2.2 Guidance from Environment Court Practice Notes

Parliament has left the interpretation and administration of the RMA to quasi-judicial and judicial bodies. To assist in the administration of the RMA the Court has published Practice Notes which are '...a guide to practice in the Environment Court generally. They are not to be seen as inflexible rules, but should be followed unless there is a good reason not to' (*Environment Court Practice Notes*, 1998). These notes set out the Court's case management procedure following the lodging of proceedings. The Environment Judge who views the case may initiate any of the following actions:

- Suggest the parties may consider mediation or other alternative dispute resolution processes as contemplated under s.268 of the RMA.
- Give directions as to disposal of preliminary issues, or about a priority hearing or special fixture.
- Give directions for a pre-hearing conference.
- Give directions to include the case in a call-over list⁴⁷.

Regarding entry into mediation, the Court advises in *Practice Note 11* that all parties are entitled to have their proceedings heard by the Court and there is no obligation to participate in mediation. The Court does, however, encourage parties to consider mediation and other forms of ADR. No party is forced to accept the result of mediation. However, once signed by the Court, any mediated agreement is binding on the parties (MfE, 2001, p. 6).

Mediation and how it will be conducted has not been defined in the RMA or Regulations. In working papers written during the Resource Management Law Reform process, it was suggested that '...principles of legitimacy, fairness and cost-efficiency should guide the design of any mediation procedure proposed for resource management conflicts' (Chart cited in MfE, 1988, p. 9). It was also suggested that it would be necessary for all mediated solutions to be approved by the Court or Judge alone so as '...to avoid decisions which may be contrary to the wider public interest'⁴⁸ (Palmer

⁴⁷Callover: The procedure by which proceedings which have been placed in a list pursuant to rules of court or by direction are assessed to determine whether or not they are ready to be allocated a hearing date before a judge or master. (*Butterworths Guides. 'Legal terms'*. 1998. Gen.Eds. Nygh P.E. *et al.* p.16). 'A callover allows opportunity for proceedings to be withdrawn; or (following settlement of issues) for consent orders to be proposed for disposal of the proceedings; or for directions to be sought and given in preparation for hearing of the proceedings including disposal of preliminary questions, timetables for delivery of evidence, and the time of hearing of the case.' (*Environment Court Practice Notes 13* 1998).

⁴⁸ Public interest is an interest common to the public at large or a significant portion of the public. [Public Policy 2]. Public Policy 2: the interests of the community in general. (Spiller, 2001, p. 246).

cited in MfE, 1988, p. 39). Flexibility in defining the types of dispute that may use mediation and monitoring of mediation efforts was also encouraged. It was considered this would allow policy and procedure to evolve in the light of practice (Chart cited in MfE, p.1988, p. 9). It would appear that this flexible approach has been adopted, with s.268 being left open for the Court to interpret and design mediation procedures (Mulholland, 1990, p. 81).

The legislation has not defined mediation, neither has the Court. As the Court cannot initiate issues, it remains for a party to bring the matter before the Court in order for the Court to define the nature and process of mediation under the RMA (Mulholland, 1990, p. 116). In the absence of a definition of mediation within the RMA, the general rules of statutory interpretation must be applied (Mulholland, 1990, p. 128).

The Court has adopted the following administrative procedure for mediation. Once proceedings are lodged with the Court, an explanatory letter, suggesting the parties consider mediation, may be sent out by the Registrar of the Court if the case is considered by the Judge to be suitable for mediation (PCE, 1996; *Practice Note 10*). This letter gives a brief explanation of the mediation process, indicates that a Commissioner could act as mediator at no cost to the parties or a private paid mediator could be used. Section 268 is considered to be an empowering provision. There is no requirement that the Court provide a mediation service (MfE, 2001b). The Court, however, provides this service because mediation is 'recognised as an effective way for parties to come to a solution themselves and help reduce the Court's case load' (MfE, 2001b).

An undertaking is given by the Court that the Commissioner will not be involved in any subsequent hearing of the appeal. This appears a matter of Court policy as s.268 (2) does not require this if the parties agree and the Court considers that it is appropriate (Bollard *et al*, 1998, p. 711). The Court, again as a matter of policy, advises that no person's case will be prejudiced if mediation is unsuccessful. The process is conducted 'without prejudice'⁴⁹. An unsuccessful attempt was made by a party to access notes made by a mediator during mediation. See *Mortimer v Whangarei District Council*

⁴⁹ Without prejudice: Without loss of any rights. The phrase describes a legal action that in no way harms or causes the legal rights or privileges of a party (Garner, 1995,p.937).

C023/97. This raises the matter of notes from a without prejudice process being kept on the file where a Judge could later read them.

S.297 requires every decision, determination or order of the Court to be in writing and signed by the Court member who sat at the hearing or inquiry. This Court 'endorsement' could be considered a 'safety net' (Rive, 1996, p. 217).

The legislation gives no guidance as to the procedure followed if settlement is reached through mediation. Since mediation is not a hearing or inquiry under s.269, the Court has devised a procedure for signing off consent orders (Bollard *et al*, 1998, p. 715). The parties submit a draft consent order and explanatory memorandum to the Judge in chambers or the Court in an ordinary sitting (Bollard *et al*, 1998, p. 715). The parties do not have to appear before the Court if they supply the text of the consent order, which has been signed by all the parties, '...with a sufficient explanation of what is proposed and why' (Practice Note 17). The assumption is that the Court will assess the settlement to ensure that it complies with the RMA, in particular Part II, and policy statements (Baylis, 1992, p. 150; PCE, 1996; Bollard *et al*, 1998; MfE, 2001). The Court has indicated that it looks for aspects of the public interest that may go beyond the interests of the parties in mediation (Sheppard 1996 cited in Rive, 1997, p. 216), that the settlement is within the Court's jurisdiction and in keeping with the purpose of the RMA (Bollard *et al*, 1998, p. 716).

In the absence of clear legislative guidelines, it would appear that the review of mediated settlements is limited to exceptional cases, unless review conditions have been incorporated into the agreement (Bollard *et al*, 1998, p. 714).

5.2.3 Guidance from case law

In the absence of clear directions in the legislation, case law contains comments and statements (dicta) from the Judges that help to clarify some matters relating to mediation. Many of the Court's statements arise in the context of seeking costs after a case is resolved, either by mediation or a Court hearing. The following decisions give some guidance as to the Court's approach to mediation.

Nature of the process

Mediation is a legal instrument utilised by parties to try and settle issues and prevent expensive hearings. The costs involved should not be part of cost

applications because there has been a mutual (and genuine) attempt to try and settle issues. Following the mediation, as is the usual procedure when no agreement is reached, the case is set down for hearing (*Clover v Auckland City Council* W034/97).

The foundation of the mediation process is a level playing field in terms of shared information and an adequately informed basis. (*Campbell JA and Others v Southland District Council* W027/95).

Entry into mediation

Participation is voluntary. Parties are not obliged to submit to mediation even though the RMA encourages alternative dispute resolution (*Duncan v Wanganui District Council* A149/92). Parties are entitled to wait to have their case heard by the Court. Mediation is a process that the parties must freely agree to (*Waikato District v Jacobs DC*.C028/95).

Role of the Court

Once an appeal has been lodged the most appropriate course regarding the initiation of mediation is to apply to the Court under s.268. (*Wood v Selwyn District Council* C073/94). The Court can encourage mediation (*Buller District Council* C029/98). The Court can indicate that it considers that mediation should be possible (*New Plymouth v St. John Ambulance* W139/95) and that the matter should have been referred for mediation (*Rodney District Council v Shephard* A103/99; *Kiddle v Wellington City* W024/97). The Court has expressed concern where a party is unwilling to explore the possibility of settlement (*Ward v Queenstown Lakes District* W056/97). Parties can request mediation but other parties may not agree that the matter is suitable for mediation (*Stephen v Far North District Council* A074/98). All parties must agree to mediation.

Cost of mediation

Consent to mediate or otherwise is not taken into account when assessing costs of an appeal (*Wood v Selwyn District Council* C073/94). The cost of time spent in mediation cannot be claimed (*Waikato District v Jacobs DC* C028/95). Parties should feel free to participate in mediation without the risk of costs being awarded against them (*Bayview Subdivisions Ltd. v Nelson City Council* W070/97).

Parties should not be penalised for failing to agree to mediation (*Campbell JA & Ors v Southland District Council* W027/95). Parties who refuse to mediate should be

prepared to bear some part of the costs of the consequent appeal (*Kiddle v Wellington City Council* W024/97).

Mediation must be treated with urgency

The Court's workload and backlog of cases are such that attempts to settle must be made sooner rather than later (*Te Ehanau A Te Ehutu Iwi Authority Inc. v Historic Places Trust* A053/97). Mediation cannot be used by parties to delay resolution of the matter by the Court (*Awaarora Bay Limited v Auckland Regional Council* A118/98).

Mediators' notes are confidential

Where an Environment Commissioner acts as mediator, their notes are like that of a Judge under District Court Rules and covered by r69 (12). They cannot be searched under the Privacy Act 1953 and the Official Information Act 1982 (*Mortimer v Whangarei District Council* C023/97). As reference is made in that decision to Commissioners, as defined in the RMA, it would appear that this rule does not apply to private mediators. If parties chose such a mediator then the notes of that mediator would not be confidential in terms of the Privacy Act 1953 and the Official Information Act 1982.

Information shared in mediation

There is a need for privacy, during the mediation process, to ensure that information shared and actions taken during mediation cannot later be used against any party in the Court hearing (*Winstone Aggregates Ltd v Franklin District Council* A141/00). No guidance is given as to whether or not information shared in mediation can be used in a context other than the Court as it refers only to its use in Court. A requirement that information cannot be used in 'any other proceedings' may avoid such situations arising (AMINZ, 2000, p. 4).

Consent memorandum

Any agreement reached in mediation has to be approved by the Court as, once an appeal has been lodged, it can only be resolved by the Court. Approval is not a foregone conclusion. There is no obligation on a Judge to grant a consent order, as the Court has '...the power and responsibility to ensure that a consent order is consistent with the purpose of the RMA, or relevant policy statement or plan' (*Wood v Selwyn*

District Council C073/94). Any consent memorandum must be within the Court's jurisdiction (*Central South Island Fish v Canterbury Regional Council C153/99*).

5.2.4 Guidance from publications

As ADR has increased so has the availability of information on mediation in general. Specialised publications and training are available for individuals involved in the area of dispute resolution. Prior to 2001, when the publication *You, Mediation and the Environment Court* (MfE, 2001) was released, the amount of information available to the general public that related specifically to mediation in the Environment Court was very limited. The MfE publication aims to assist those considering mediation by providing an explanation of mediation, its advantages, limitations, basic principles and the stages in the mediation process.

The parties I interviewed had participated in mediation prior to this publication being available. Participant interviews highlight the lack of information on mediation generally that existed prior to this publication.

5.3 The extent of environmental mediation under s.268 of the RMA

The number of appeals or applications lodged with the Court has increased significantly over the period 1993-1999, in part due to the completion of the first generation of planning instruments under the RMA (Dept. of Courts, 2001, p. 2:19). The Court's heavy caseload has been of concern to those administering the system (Registrar of the Court, Annual Report 2000, p. 6) and lead to the promotion and support for mediation as part of the Court's case management strategy.

The mediation of cases has only been included in Court records since 1997. As is evident from Table 2, only a small portion of matters referred to the Environment Court, were settled by mediation. Prior to 1996 the Court did not keep a record of all cases that went into mediation or cases that were settled as a result of mediation (W. Dougherty, pers.comm.2001). Figures since 1996 indicate that the use of mediation has increased although the outcomes are less clear. Comments made by Commissioners during interviews, and the increased figures for the years 2000 and 2001, would indicate that the use of mediation since 1996 may be significantly higher than the Court figures indicate.

Table 2: *Summary of Cases before the Environment Court 1994-2000*

Year	30/6/94	30/6/95	30/6/96	30/6/97	30/6/98	30/6/99	30/6/00	30/6/01 ⁵⁰
Appeals applications registered	860	1055	1840	1224	1373	2263	1270	
Heard/disposed of (includes Consent Orders & withdrawals)	792	756	1080	1198	1184	1380	1195	
Formal decisions issued	355	357	378	349	408	502	832 ¹	
Awaiting determination			1670	1840	1999	2869	2940	
Referred for mediation	5 ⁴	30 ⁴	41 ⁴	64	121	188	188	334 ³
Referred for hearing								64
Consent orders from mediation	3 ⁵	9 ⁵	29 ⁵		46		22 ² finalised 24 waiting	175 settled/ with- drawn
Adjourned for further discussion	9 ⁴	14 ⁴	3				77	95

Source: Figures taken from Reports of the Registrar of the Environment Court for the 12 months ended 30 June 1994, 1995, 1996, 1997, 1998, 1999, and 2000. E.49. Presented to the House of Representatives pursuant to section 264(1) of the Resource Management Act 1991.

1. This increased figure reflects a change in the recording of determinations, with all Court issued consent orders, interlocutory or other determinations now treated as formal decisions.
2. It indicates a change in the recording system for mediation.
3. Provisional figures supplied by the Registrar of the Court, September 2001.
4. Number of mediations conducted by Commissioners (Source: Rive, 1997, p. 211).
5. Settlements reached (Source: Rive, 1997, p. 211).

⁵⁰ Provisional Figures supplied by Environment Court September 2001

In the 1997 to 1999 Annual Reports there was little detailed information on the use of mediation apart from the comment about '...a growing trend towards mediation'. One of the Judges has provided the following information on the extent of mediation in that period.

One Commissioner's caseload has provided the following statistics of what has so far occurred in the years between 1995 (when mediation was not frequent) and 1998. In 190 hours of meetings (an average of 3+ hours each for 52 mediations) 71% of those cases referred have been completed with a successful outcome: 13 % have been adjourned for further research etc to be undertaken, the Commissioner stating that more than likely these will be resolved satisfactorily. So far only 15% (that is 8 out of 52 cases) have come to the Court for final resolution (Kenderdine cited in RMLA, 1999, p. 16).

This indicates that at least one Commissioner was personally keeping records of time spent in mediation, as the Court did not instigate the keeping of records of mediation by Commissioners until November 1999. A three-week pilot study carried out by the Environment Court in Nelson resulted in 16 out of 30 cases being resolved without a hearing, a success rate of approximately 50% (PCE, 1996, p. 41). It is not clear under what circumstances the parties entered mediation i.e. at the Judge's suggestion or of their own volition.

In the year 1999-2000 188 appeals or applications before the Court were referred for mediation. These cases comprised 15% of the total number of appeals lodged. These occurred on 116 days. The average length of time taken for mediation was not given. Judge Kenderdine's figures indicate 3+ hours (Kenderdine, 1999). Participants in the interviews indicated the time ranged from a day to days. They were not asked to give an exact figure on the time spent in the actual mediation. A 'day' may mean that, with travel time included, it took a day.

Concern was expressed about the Court's recording system. Only successful mediation appeared to be recorded. Additional categories, which could be recorded, are:

- Partially successful mediation, i.e. where issues were narrowed and the Court made a determination on a reduced number of issues;
- Mediation that failed to result in a consent order but was later settled privately without recourse to the Court, and
- Cases where mediation could be considered to have assisted settlement.

The inability of the Court system to record these categories had been recognised and led to the introduction of a record form for Commissioners in November 1999. During the interviews, some Commissioners expressed reservations regarding this form because of the without prejudice nature of mediation. The length of the form (six pages) appeared to act as a deterrent to busy Commissioners. It is not compulsory for Commissioners to complete the forms in their entirety. The Court has advised that not all Commissioners are completing them.

In informal discussions, Registry staff indicated that, prior to November 1999, it was hard to record what had happened to appeals or references on account of the way in which files were handled. Cases, once lodged, were given a file number and sent out to the relevant region for the Judge to action. Regional Court offices may direct cases for mediation to a Commissioner or give it to the Registry to action. The Registry in Wellington may not be aware of the action taken unless it was noted on the file. Where cases were withdrawn, the reason for withdrawal was not necessarily noted on file. The instances where mediation had led to a withdrawal of an appeal or reference were therefore unknown. Also unknown were the number of instances where parties had signed an agreement then changed their mind and reneged on the mediated settlement. The Report of the Registrar of the Environment Court 1998 stated that:

Of the 121 mediations, undertaken during the year, 46 cases resulted in consent orders. In many of the remaining 75 cases, even though mediation was not achieved, the discussions led to a narrowing of the issues and reduction of Court hearing time (Registrar of the Environment Court (Registrar), 1998).

Actions by the Court and Ministry for the Environment have encouraged the use of mediation. The Court continues to commit funds to mediation training for Commissioners (Registrar, 2000, p. 14). The Environment Court Practice Notes 10 *Case Management* advises that a Judge may suggest that parties consider mediation or other dispute resolution processes. The Court also ‘...encourages parties to consider mediation and other additional dispute resolution procedures’. The Registrar has indicated that ‘Parties will need to show they have been diligent in their attempts to resolve their dispute by other means (such as the assistance of a Court appointed mediator) and that all other reasonable avenues have been exhausted’ (Registrar, 2000, p. 11; Sakar, 1998, p. 33). The Court has been ‘delighted’ with the increased use and success of it (Sheppard, 1998, p. 18).

The MfE has reinforced the use of mediation through the administration of the Environmental Legal Assistance scheme. One of the criteria taken into account when assessing the merits of applications for funding for legal aid is whether the group is open to having the case resolved by mediation. Where groups do not wish to enter mediation they need to explain why on their application form (MfE, Feb., 2000). These initiatives, combined with the recent publication of a guide to mediation in the Environment Court, give the impression of a concerted effort by Government to make parties give serious consideration to mediation as a method of dispute resolution.

An issue that became apparent during my investigation of mediated settlements was the circumstances in which final settlements were available to the public. Recorded decisions, which are public documents authenticated by the seal of the Court, enable the public to access these decisions and view the terms upon which the settlement was granted. Such openness is desirable given that many resource management decisions may directly or indirectly impact on the public. As noted earlier, the practice of not giving consent orders a decision number has reduced the ease with which the public can access them. This appears to be contrary to the open nature of all other hearings under the RMA and the encouragement of public participation. It was therefore pleasing to note in the Report of the Registrar of the Environment Court for the 12 months ended 30 June 2000, that the Court had, during the year, changed the way in which it recorded determinations. As from 2000, all Court issued consent orders, interlocutory or other determinations were to be treated as formal decisions (Registrar, 2000, p. 6). Some, but not all, Environment Court regions had previously followed this practice. The difference in recording methods can be seen in Tables 3 and 4. Christchurch Region appears to have been giving all consent orders a decision number prior to the Court's directive in 2000. This is reflected in the number of decisions issued.

Table 3: *Decisions issued by Environment Court Regions*

Year	Auckland	Wellington	Christchurch
1992	101	59	80
1993	140	107	103
1994	90	133	123
1995	125	169	85
1996	110	192	99
1997	152	132	135
1998	155	140	144
1999	158	126*	231
2000	150	105	216

Figures taken from Brief. New Zealand Resource Management Appeals. Full Consolidated index and case summaries of all reported and unreported resource management cases 1993-2001 (Butterworths of New Zealand).

*NZ Environment Court Decisions 1999. Wellington Registry. Decisions W1/99-W 126/99.

In the absence of readily available figures from the Court, consent order figures were taken from New Zealand Environmental Digest in order to determine the extent to which consent orders were being used to resolve matters. Table 4 shows the number of published consent orders within each Court region. These figures indicate a significant difference in the number of consent orders published in the three Court regions. It is not known what proportion of these consent orders were achieved as a result of mediation.

Table 4: *Consent Orders issued by Environment Court Regions*

Year	Auckland	Wellington	Christchurch
1996	8	9	40
1997	7	9	46
1998	7	10	47
1999	8	11	117
2000	7	30	124

Figures taken from New Zealand Environmental Digest Index Nov.1999, p. 40-45; April 2001, p. 15-18.

Informal comments by Court staff and interviews with Commissioners would suggest that Auckland's low numbers are due to the way in which consent orders are recorded. I did not investigate this matter with the Judges during the interviews.

5.4 Conclusions

The RMA has legitimised mediation as a way of resolving environmental disputes but has left the procedures relating to the initiation and implementation of mediation undefined. The Court, in the absence of clear legislative guidelines, has issued Practice Notes and determinations that give some guidance as to the nature and way in which mediation is undertaken. Some matters relating to the mediation process remain undefined and unclear.

Published records, confirmed by anecdotal evidence from Commissioners, indicate that Court assisted mediation has increased significantly since 1993. The full extent of the use of mediation and the types of issues being resolved is unclear due to the way in which the Court has recorded mediation. The Court's system for recording the use and outcomes of mediation has developed as the practice of mediation has increased.

Monitoring of mediation, under s.24 RMA, is considered important, as these mediated settlements could be considered to constitute some of the more significant resource management decisions occurring in New Zealand. Until those organisations administering the RMA record the outcome of all Court assisted mediation, it will not be possible to identify the extent to which mediation is resolving environmental disputes in New Zealand. This task could be considered beyond the scope of the Court's administrative functions and more correctly the task of the MfE.

The promotion of and support for mediation by the Court and various government departments and agencies has increased in the past decade. The increased Court caseload appears to be one of the main reasons for the promotion of mediation as an additional method of dispute resolution under the RMA.

Chapter 6: Perspectives of the Environment Court Judges

6.1 Introduction

This chapter presents the findings from the interviews with the Judges. Judges are politically independent of government and seen as symbolising impartiality, justice and fairness (McDowell *et al*, 1995, p. 252). When interpreting legislation that is not clearly defined, Judges may exercise their own judgment and discretion. Such a situation could be considered to exist with regard to mediation under the RMA (McDowell *et al*, 1995, p. 105, 256). It was therefore anticipated that there might be some variation in each Judge's perception of mediation, given the independent nature and role of the judiciary.

6.2 Findings from the interviews with Judges

At the time I undertook my interviews (late 2000), there were five Judges and one Alternate Judge working a demanding court schedule throughout New Zealand. While it was desirable to personally interview all Judges, locational considerations and work commitments did not allow this to occur. I undertook personal interviews with four Judges. My findings from my interviews with the Judges are presented under the following headings:

- Judicial action prior to mediation.
- Judicial involvement during mediation.
- Judicial action post mediation.

6.2.1 *Judicial action prior to mediation*

The Judges are the first group in the Court process to assess a reference or appeal. The following is an outline of the basic case management strategy that emerged from my findings.

Case management strategy

Once the Court Registry in Wellington received a reference or appeal, the Registry checked it had arrived within the statutory time frame and that all documentation was correct. A file, with an RMA file number, was made up, comprising all the initiating documents. Case files were sent to the relevant Judges as the cases were lodged. Each Judge was responsible for case management in a particular region of New Zealand, although they did not necessarily hear every case in that region. The Judge read the file with the initiating documents then made a decision as to how the case was to be

managed. At that time the Judge decided what directions to give Registry regarding case management.

Assessment of cases

The matters looked for at the case management phase varied between Judges. Reading the initiating documents on file was considered to be one way to get an impression of whether or not mediation may be possible. The criteria on the case management sheet attached to the file were also checked. Examples of the types of matters that may be looked for by a Judge during their assessment were:

- The issues in dispute.
- The type of parties involved.
- Whether or not any issues could possibly be mediated.
- Whether or not the case warranted asking the parties if they were prepared to mediate.
- The best place to hear a case.
- Any jurisdictional issue and
- Whether or not there was urgency for a hearing.

This assessment is limited, given the nature of the documents put before the Judges and their workload. This may explain why the Judges are careful to suggest that a case may be suitable for mediation rather than say that it is.

Determining the suitability of a case for mediation

Experience was considered an important factor in deciding whether or not a case was suitable for mediation. Some Judges had learnt from experience that sometimes it was not worth suggesting mediation. Some matters were so hard fought and the public interest issues such that a Judge would not set the matter down for mediation unless requested by the parties. All Judges agreed that some cases were more amenable to mediation than others. The characteristics of cases they considered amenable to mediation were:

- Issues that were clear cut in ambit and related to (say two party) neighbourhood disputes.
- Issues that were fairly confined without a major number of submitters or potential submitters who wished to appear under s.271 A.
- Cases of simple value judgments.

- Cases where the matter had dragged on for a long time and where some common sense could, potentially, be brought to bear.
- S.120 appeals against conditions on resource consents. In these cases, no one had asked the Council to overturn its decision so there was more room for the Council to move.
- Where it looked, from reading the file, like parties may be able to reach a solution. It was noted that it was hard to describe in absolute terms what these might be.
- Where there were very technical issues that the experts may be able to work through.

Those cases considered less amenable to mediation were:

- Cases containing some major matter of principle or law and
 - Cases involving large numbers of people where mediation might be difficult to manage, e.g. 30-40 people wanting to be heard and/or appear under s.271A.
- Examples of such cases were cell phone towers and major public works. It was questioned if it was realistic to run mediation with so many people.

Each Judge had a trigger point at which they would suggest mediation with several considering they had a low trigger point. A Judge may suggest that mediation be explored if they thought it was reasonably possible that it may achieve something. Even in cases where there was a large public interest component, there may be issues that could be mediated out of the hearing thus allowing the core issues to go to the Court. While mediation was supported, compulsory mediation was not. While a Judge may favour mediation, with its agreed solutions, it was for the parties to decide if a case was unsuitable for mediation. It was recognised that the public interest was a big factor in the Court's work. If people considered there was enough public interest to warrant bringing a matter to Court then that had to be respected. A large part of the Court's work was simply between two parties with no public interest component. References were considered high public interest issues. However the idea of mediation had spilled over into settling references and Councils were negotiating with the respective parties. A Judge had noted that there appeared to be a different process for Plan references. Parties did not want them set down for hearing by the Court, as they wanted, through negotiation, to sift the cases to see what should and should not go to Court. The residual cases came to Court.

Judicial action if a case was considered suitable for mediation

If a Judge considered a case may be suitable for mediation that was noted on the file. The Registry then sent a standard letter to all parties explaining what mediation was and advising them that the Judge managing the case had suggested that the case may be suitable for mediation and asking whether the parties agreed.

It was considered that case management did not necessarily mean the Judge waited for the parties to initiate mediation but rather the Court was pro-active in asking about the possibility of mediation. Taking a more pro-active approach could, however, give rise to some problems. Where a Judge shared their reasons for suggesting mediation, it could be taken as indicating something of a view on the merits of the case. In such a situation a Judge may feel they should disqualify themselves from the hearing.

It was pointed out that, under the RMA, participation in mediation was voluntary and Judges could only refer cases to mediation if all parties agreed. It was considered that if only a few stakeholders were willing to participate, mediation was unlikely to be successful. One Judge commented on this point in some depth. It was recognised that, if the majority of the parties wished to mediate in order to narrow issues or had all reached a consensus except one, then pressure could be put on that party to agree. Much would depend on whether or not the party standing out was a vital party, for example a s.271A party. It was suggested that, if a party did not want to mediate or agree to a mediated settlement, especially if it was a s.271A party, then that party may have to show why mediation or an agreement should not proceed.

The Judges considered that parties were entitled to have their case heard by the Court so must be allowed that opportunity. If parties considered there was enough public interest to warrant bringing the case to Court then the Court must respect that. It had been noted that it was rare for parties to say they would agree to mediation when they filed proceedings in the Court, so a Judge could only suggest, via the Registry, that the parties may like to consider mediation.

Once parties agreed to the Court's suggestion of mediation, two possible courses of action were taken. The Registrar consulted with the Judge responsible for the case and resolved issues such as the availability of a suitable Commissioner, the expertise of the Commissioner and possible venue, subject to what the parties had suggested.

Commissioner availability, interest and expertise all came into the selection process. The Court Registry has subsequently advised that now (2001), in general, availability more than anything else determines Commissioner selection.

Alternatively, a Judge may assign it straight away to a Commissioner, in order of preference, based on the Commissioner's expertise and interest. No indication was given of the parties being consulted. It was recognised that in 'pure' mediation such matching might not be acceptable. Matching was supported in this context as it was considered good mediators achieved good results. The comment was made that some Commissioners may be more suited for mediation work than others and those who did not enjoy it should not have to do it. A good result was considered to be a happy mediator, a good consent order or a withdrawal of the appeal. Often a withdrawal was seen as a good outcome as people may not have been litigating the matter that was the real issue. Some grievances went back over time. Groups or individuals may have been marginalised. Mediation may be the first time that parties have had a relatively non-threatening, supportive forum in which to express their concerns.

No Judge considered cases were unsuitable for mediation. While a Judge may not think it worth suggesting mediation, this did not prevent parties from asking the Court for Court assisted mediation or arranging their own. If a Judge did not suggest a case for mediation, the parties said 'no' to mediation or it involved major public interest issues, then it was set down for hearing. Parties may be encouraged to have a pre-hearing conference to reduce issues and define the ambit of the case.

At callover⁵¹ a Judge may check if any parties had requested mediation. Mediation may be revisited as the likelihood of mediation may have become more apparent. The parties themselves may have come to the view that mediation was a desirable option. The issues may have been narrowed, making mediation a possibility. The possibility of mediation is never excluded even if the case appeared an unlikely candidate. If parties requested mediation, provided they were sincere in their request and there were no hidden agendas, a Judge would endeavour to assist them and arrange mediation. The Court was always willing and pro-active in encouraging mediation. It had been noted

⁵¹ Callover: The procedure by which proceedings which have been placed in a fixture list pursuant to rules of Court or by direction are assessed by the Registrar of the High Court, to determine whether or not they are ready to be allocated a hearing date before a Judge or master (Spiller, 2001, p. 40).

that, with plan references, the lawyers liked several callovers as it gave them something to work towards in their negotiations.

In one Court region they were using a case management system that gave a fixture date at callover. This meant the Court had quite rigid control of cases within the system. Lawyers then knew that, if they went into mediation and it 'unravelling', they would get a fixture if they went back to the Court. It was considered that this encouraged confidence among the parties. A problem with this case management system is the shortage of Judges to assist when one Judge is involved in a long hearing.

Parties unwilling to mediate

When a party declined mediation there were various responses from the Judges. A Judge may accept the parties' refusal and proceed to manage the case towards a hearing. A Judge may encourage the parties to attend a pre-hearing conference in a bid to reduce the issues and define the ambit of the case. It was considered that, based on questions asked at callovers, sometimes parties were tentative about mediation out fear of being coerced⁵². A Judge explaining the Court assisted mediation process to the parties was believed to help the parties and allay such fears.

Mediation of cases not suggested by Judges for mediation

If the parties wish to mediate, despite a Judge not suggesting it or considering the case an unlikely candidate for mediation, then the Court let them. One Judge commented that if 30-40 parties could all agree to mediate then they (the Judge) would let them try. They would just need to be satisfied that all the parties had agreed. Unless they all agreed then there would be no point in using the Court's resources. It had been noted that some parties did not want to lose their fixture date so mediation was done very quickly if the fixture was within the next month or two.

6.2.2 Judicial involvement during mediation

The Judges' involvement in a case during mediation varied. A Judge may determine to have no contact with the Commissioner during mediation. Alternatively, contact may be confined to case management matters, such as letting the Judge know that more time was needed for the mediation. In some instances Commissioners informally sought advice from a Judge on procedural matters, questions of law or matters such as the

⁵² Coercion: persuade (an unwilling person) to do something by using force or threats. (Concise Oxford Dictionary, 2001).

public interest component of a case. The Judges' involved in giving such advice saw it as informal and non-binding. In some instances a Judge may advise a Commissioner that if they had any hesitation regarding the mediated outcome then they should make sure the case came before the Court for hearing. All Judges indicated that they did not want to know anything about the details of the mediation. The less they knew the better from the point of view of their impartiality if they were required to later hear the case.

6.2.3 *Judicial action post mediation*

After mediation was completed, a Commissioner would report back to the Judge with the outcome of the mediation. This may involve a file note along with any documentation. The ways the case may be dealt with were:

Withdrawal of appeal/reference

It was considered that there was little a Judge could do about this if that was what the parties requested. The Judge would check if there were any file notes from the Commissioners as to why the matter was withdrawn, for example, if parties were satisfied by a side agreement. A Minute was then made on the file to the effect that the appellant or referrer had withdrawn.

- **Record of determination**

Some parties wanted the Judge to record the reasons why they withdrew in the record of determination of the appeal. If that was the case the Judge recorded these.

- **Another order**

The parties may wish the Judge to amend the original decision.

Matters the Judges consider when viewing a mediated settlement

The matters looked for varied and not all Judges looked for all of these matters.

- **Legality of the document or consent order.**

Some Judges looked to see that the document did not offend any general legal principles and that the agreed solution was within the Court's jurisdiction. It was noted that occasionally a mediator might overlook the fact that what the parties had agreed to was outside the scope of the particular case.

- The public interest

The public interest may be considered. The comment was made that the parties had looked after their own private interests so the Judge would look to see if the agreement was consistent with the public interest as expressed in the purpose of the legislation and subordinate legislation, for example, the Regional Policy Statement or District Plan.

- Capable of being given effect

A Judge may look to see that the agreement was reasonably certain in terms so that it was capable of being given effect.

- Appropriate in RMA terms

A Judge may look to see if it was an 'appropriate' order with an appropriate memorandum. Appropriate was defined in RMA terms. From the response given, it was unclear as to what was appropriate in the RMA context.

- Matters of national importance

One Judge considered that it was not for the Judge to question the merits of the agreed solution. They did however look at jurisdictional aspects and whether or not matters of national importance had been dealt with satisfactorily. They acknowledged that their consideration of the latter was superficial.

- Mutually agreed solution with correct documentation

A Judge may look to see that all parties had agreed and that the documentation was acceptable. As to what was acceptable was not defined by the Judges. It is assumed that Environment Court Practice Note 17, which requires the text of a consent order to be submitted in writing with sufficient explanation as to what is proposed and why, is a minimum requirement (Environment Court, 1998). If a Judge had any reservations about the documentation then a Minute was issued and the matter referred back to the parties. The parties may confer without the Commissioner; the Judge may call a conference; or the mediation reopened, in order to achieve an outcome that covered the concerns raised. Side agreements made during mediation did not come to the Judge. Their contents, including any amounts of money paid, remained confidential to the parties.

Particular matters that the Judges considered should be present in a mediated settlement

Each Judge had particular matters they looked for in a mediated settlement. The following list includes all those matters raised by the Judges in interviews. No one Judge indicated that they looked for all of these.

- That all parties consent, i.e., that no party has been left out of the process; that there had been no pressure for parties to agree and that parties signed of their own volition.
- That the order can reasonably be made in RMA terms. There was no point in putting forward an agreement if it was going to fail to create a satisfactory environmental result.
- That the agreement will bring a responsible outcome in RMA terms and is not just conceived to suit the narrow interests of the parties.
- That the settlement comes within the parameters of the original appeal or plan reference and is relevant to the case in point.

6.3 Judges' views of mediation

All the Judges interviewed considered the basic process was working well. Mediation was increasing in importance and was a valuable tool for managing the Court's workload. As a result of the legislation, case management system and Registry support, thousands of dollars were being saved and a more streamlined Court system was being developed. Commissioners were seen as willing and enthusiastic about mediation, equal to the task and developing further skills with experience. The public or client response had been that the Commissioners had been very helpful. This had been borne out by the number of successful outcomes.

One Judge saw no need for any changes in the present mediation system. Others recognised that the Court was adjusting to mediation and some changes or improvements could be made. Suggestions were:

- A system tailor-made for the Environment Court jurisdiction. Mediation in the Environment Court was seen as different from other forms of mediation. The Commissioners have acquired certain skills as members of the Court. Parties often looked to the Commissioner to acquaint them with options or advise how the Court would view the case if it went to a Court hearing. The Court remained neutral but was in a position to help the parties with the various possibilities and what the

realistic achievements might be. There was a need to devise a system that recognised this uniqueness.

- Reviewing the process so that it was well set up and enabled the smooth allocation of Commissioners' time and liaison with the Registrar.
- Case management. At least one region was trying a more structured case management system. A Judge suggested that the date for mediation and the venue could be arranged at callover to reduce the need for the Registry to follow up. At callover, the Court could go to greater lengths to explore the venue options parties had in mind and the date.
- Where mediation failed to reach total agreement between the parties, then the Commissioner should outline the issues in dispute for the Judge.
- The Court needs to recognise that not every Commissioner is suited to mediation. Training, support and mentoring build confidence in the process. The Court puts a lot of trust in Commissioners who mediate cases.

6.4 Conclusions

All Judges considered mediation had a role within the Court system. A general case management strategy emerged, with a more stringent approach being taken to case management in one region. There was variation in the approach taken by the Judges prior to, during and after mediation that had implications for both the Commissioners and participants. Variations were noted in the following areas:

- Prior to mediation.

The option of mediation was put before the parties in a variety of ways, some more proactive than others. The Judges' response to a party's decision regarding participation in mediation also varied from acceptance to an explanation of the process. It is conceivable that participants may interpret a Judge's action in various ways and make assumptions that then determine their approach to mediation.

- During mediation

Some Judges gave advice to Commissioners during mediation while others did not. While this advice may have assisted the particular Commissioner it could, depending on the matters discussed, raise questions regarding the without prejudice nature of the mediation process. It may also determine whether or not the Commissioner allowed the case to continue in mediation.

- Post mediation

The criteria used by the Judges to assess a mediated settlement varied, with each Judge emphasising slightly different criteria. An explanation of the criteria used by Judges when viewing mediated settlements may alter the present public understanding of the Judge's role when signing off on a matter.

The majority of Judges recognised that there were areas for improvement within the current process from an administrative and case management viewpoint. Consistency of approach when assessing cases for mediation, managing cases and viewing mediated settlements would appear desirable in order to ensure that mediated outcomes meet the purpose of the RMA.

Chapter 7: Perspectives of the Commissioners

7.1 Introduction

In Court assisted mediation, Commissioners conduct the mediation. One of the themes in the literature reviewed earlier was that the role of the mediator was very important for the success of the mediation process. I therefore explored this in my interviews with both the Commissioners and the participants. I also sought the Commissioners' view of mediation and the way in which they conducted it. In this chapter I present my findings from the interviews.

7.2 Findings from interviews with Commissioners

The findings are presented under the following headings:

- Training for mediation
- The role of the mediator prior to and during mediation
- The mediation process
- The future of mediation

7.2.1 *Training for mediation*

All Commissioners had had some formal training in mediation but the variation in the amount of training was considerable. All but one had undergone the first level of LEADR training. One Commissioner was of the view that LEADR was the only organisation providing such intensive short-term training courses. Some Commissioners had completed an advanced LEADR course, others had attended annual refresher courses. It was recognised that training needed to be followed by actual work so that the skills learnt were not lost. Four Commissioners had also undertaken training with other organisations or individuals. These included IBM; arbitration; five-day and three-day advanced mediation courses run by Roger Kemp in Christchurch; public strategy negotiation at Harvard University and a short mediation course at Stanford University. In addition, two mentioned the informal, hands-on training and experience they had gained while working in a professional capacity prior to becoming a Commissioner.

Several Commissioners commented on the training provided. In reality, they saw mediation as applied common sense. Training was recognised as necessary, despite

reservations about the cost and perceived promotion by some trainers of fairly rigid rules for mediation.

7.2.2 *The role of the Commissioner*

The Commissioners were asked what they considered the role of the mediator was in mediation. Six used the term facilitator. One of this group commented that facilitation occurred before, during and after mediation. Various other roles identified were: intermediary between the parties and the Court; manager of the mediation process, both before and during mediation; assistant to the parties and catalyst. Tasks the mediator may undertake were:

- To help people come together to resolve their problems.
- To guide discussion to reach a resolution.
- To provide a forum where people can reach an agreement without any coercion and that they are reasonably happy with.
- To ensure the process was fair.
- To keep the process informal.
- To empower the parties.
- To watch and manage the release of tension and to control it so it didn't go beyond reasonable bounds.
- To let people have their day in court, and feel that they have had justice.
- To let people feel they have been listened to, had a fair go and had their say.
- To ensure confidentiality.
- To facilitate lateral and creative thinking.
- To act as a catalyst. By their presence they trigger action and reaction.
- To provide a less costly and more efficient place [than the Court] where people could come to workable and enforceable agreements so they could get on with their lives.
- To advise parties about the likely outcome if the parties went to Court, based on their own knowledge. Environmental mediation was unlike other forms of mediation in this respect.

The Commissioners' responses indicated that they did not see their role as being confined to simply one task but varied, depending on the needs that arose during

mediation. Several, in explaining the mediator's role, referred to multiple roles they may take during mediation, e.g. catalyst, facilitator and encourager of lateral thinking.

Role prior to mediation

The action taken by the Commissioners, once they had been asked by the Court to conduct mediation, ranged from doing nothing to telephoning the parties. Six left it to the Court to contact the parties, set up the mediation and supply the parties with any information regarding the mediation process. The Registry did, in some circumstances, send a letter to the parties. The helpfulness of this letter to parties was questioned. Five Commissioners had their first contact with the parties on the day of the mediation. Occasionally, a pre-mediation meeting was arranged to set guidelines for the mediation. In one instance the parties had requested it. The Judge agreed as they also saw the need, due to the number of issues involved and the potential for the mediation to go off track. Another Commissioner indicated that they would very much like to run pre-mediation conferences. They would always hold one if there was any indication that a pre-mediation conference was needed. They did not indicate how or when they decided that a pre-mediation conference was needed.

Two Commissioners personally sent a letter to the parties that outlined the process and their expectations of the parties who participated. Another was considering sending out a similar letter. In response to a question as to who should get such a letter, it was considered that lawyers may not need a letter of explanation from Registry or the Commissioner, however non-lawyer parties needed to be sent something. One Commissioner did not send anything to the parties but instead rang them. Another sent a letter then rang the parties.

Role during mediation

At the commencement of mediation all Commissioners gave an explanation of the mediation process and set out the ground rules. One Commissioner indicated that the amount of information given may vary, depending on the perceived needs of the parties. For example, whether or not all parties in the case had legal representation.

The following is a summary of the various matters raised by the Commissioners. The ground rules covered at the introductory phase of the mediation included:

- An explanation of the mediator's role

Explaining, for example, that they have no statutory authority to make the parties come to a decision. It was noted by one Commissioner, that people were afraid of the Court. One of the tasks of the Commissioner, therefore, was to explain that they were not hearing the case like a Judge but rather were there to help the parties and listen to them.

- An explanation of the parties' role

The parties were required to stand back, consider the big picture and be willing to negotiate and compromise.

- The mediation is without prejudice

This was considered important in order that all parties were free to participate in lateral thinking. One Commissioner advised the parties that minimal notes were kept on the file. They personally did not think that notes regarding the mediation should be put on the file because the mediation was conducted without prejudice. They therefore considered the form that the Court asked Commissioners to fill in after mediation was too detailed and such details should not be put on the file. During interviews, a Judge had raised the matter of file notes, in particular maintaining the confidentiality of such notes.

- Confidentiality

What confidentiality meant in practice varied between Commissioners. For some, it meant that the parties did not discuss the details of the mediation outside the room. Participants could go back to a wider group and explain the results but not the details of the discussion. One Commissioner became uneasy when parties took copious notes during mediation. They told the parties that a lawyer could use these notes in Court and encouraged them to use notes made by the Commissioner on the board or in the summary of mediation progress. For other Commissioners, confidentiality meant allowing the participants to go back to the parties they represented and discuss the mediation, especially in Plan references or where Maori were involved. If anything about the mediation was reported in the media then one Commissioner would send the case to Court.

- Parties must show respect to other parties and not interrupt.

- Breaking into groups for cooling off, discussion or caucusing may occur.

Parties could ask for this at any time. These sessions were strictly confidential. One Commissioner indicated that they were uncomfortable with being part of these sessions and usually they left the parties alone. Another Commissioner considered that it would be improper for matters to be discussed without all the parties being present during the discussion. Other Commissioners went into these sessions if the parties wished them to or to check on progress.

- Power to act

Some Commissioners required that the parties had the power to sign on the day. The power to act was seen as seldom being a problem with applicants and appellants. Some Commissioners recognised, however, that not all parties, especially Maori and Council representatives, were given the power to sign off a mediated settlement by those they represented or their delegated authority was narrow.

- Goodwill was to prevail.
- The agreement would go to a Judge for a consent order. Therefore it had to be inside the law and the RMA and should not bypass the public interest.
- Any side agreements made were enforceable in the District Court not the Environment Court.

One Commissioner indicated that they might give reminders of these ground rules during mediation.

One Commissioner felt uncomfortable about supplying information regarding the cost of going to Court. This information could potentially be used as a lever to get parties to settle and if people felt pushed, mediation would not be a success. They preferred to make a general comment about possible cost saving then left it to the parties to decide.

7.3. The mediation process

7.3.1 *Defining the process*

The majority of Commissioners, at the start of mediation, outlined the way in which mediation could to be conducted and sought the parties' input and agreement. One indicated that they spoke to a structured set of notes and explained mediation, the way it

was conducted and the ground rules. This could take up to twenty minutes. Even if this information had been given beforehand, they would go over it again.

Six Commissioners were flexible and adapted the process to the parties. It was recognised that everyone must agree to the process before they would be willing to use it. The Commissioners did not see that they had a role in defining the process for the parties, rather they managed the process the parties had agreed to. One Commissioner indicated that if legal counsel were present and had a way of proceeding, which did not mean one party dominated, then they let them proceed. Another indicated that they would define the parameters within which they were working (as defined by the RMA), and then let the parties define the process. They considered there had to be flexibility to adjust the process during mediation as a party may come to feel unhappy or trapped within the process as initially defined. A Commissioner sensed this from the participant's body language or statements made. In a multi party mediation (i.e. more than four parties) time might need to be spent in defining how the process would be managed. This could take a considerable amount of time, e.g. half a day. The difficulty of getting all the parties together prior to mediation was mentioned. The use of the Court's conference line facilities was suggested as a possible alternative. The process to be followed appeared to be a verbal rather than a written agreement. Agreement may be in writing, where a pre-mediation conference was held.

Two Commissioners defined the process and asked the parties if they had any questions or were happy with the process. As one commented, for many parties it was the first time they had been in mediation and therefore they did not have any experience of this form of dispute resolution. The Commissioner believed that what the parties wanted was fair treatment.

Once again there was a variety of responses as to how the mediation process was conducted. The mediation model taught by LEADR was obviously a useful guide as a number of Commissioners made reference to it during the interviews. However, flexibility was necessary due to the different types of cases. The style of mediation could vary depending on the characteristics of the cases, e.g. multi-party, lawyer-to-lawyer. The two main stages in the mediation process, as identified in the interviews, were defining issues and resolving issues.

Defining issues

After the introductory comments were made and the ground rules set out, each party was asked to state the issues as they saw them. It varied as to who presented their case first. Often the local authority started as it had more expertise or tended to be fairly neutral. Sometimes a Commissioner asked the applicant. If there was disagreement as to who went first, a Commissioner would ask the applicant. The importance of the other parties listening during this phase was emphasised. A number of Commissioners used a whiteboard as a tool to help parties by writing up the issues so all could see. This gave visual recognition of the issues, parties concerns and any progress. For some parties this may be the first time this has been done. Sometimes the parties wanted to come up and use the whiteboard. LEADR encouraged writing up information at the end of the session but some Commissioners did this as they went along, as they believed it helped keep parties focused. Once issues had been defined, other parties were then given time to respond to what had been said. The parties may then prioritise the issues.

It had been noted that, at this point in the mediation, there may be antagonism between the parties and emotions, such as anger, may be expressed. Often there was conflict between the local authority representative and parties. These emotions had to be recognised and managed in order that the mediation could move forward. If parties were emotional, a Commissioner may 'put on a human face' and suggest a cup of tea.

Side issues

Side issues could arise at this time and would be recognised if they were seen to potentially impact on the mediation. Long standing grievances did surface and needed to be dealt with before the parties could move on to resolving the main issues. Often the side issues were the reason for the mediation. Side agreements were common. Matters that may form part of a side agreement were also noted on the whiteboard but kept separate from the RMA issues. Commissioners advised parties that any side agreement was outside the jurisdiction of the Environment Court.

Resolution of issues

The issues were then worked through one by one. Parties may be asked or encouraged to suggest ways to resolve the issues. Each step was by agreement. During the mediation the parties may, at any point, ask for a private session or caucus. A Commissioner may initiate it when things appeared to be coming to a halt, new

information was being presented or old information presented in a new way. This gave parties time to consider the information raised. A Commissioner may act as a go-between in these sessions, taking ideas from one party to another. As noted previously, not all Commissioners felt comfortable with this role. A Commissioner may take a party out of the room and talk things over if it appeared a deadlock had been reached.

Note taking

Note taking during mediation varied. Some Commissioners used whiteboards while others did not. It often depended on what facilities were available at the venue. Some Commissioners preferred that parties took notes from their notes on the whiteboard. They would ask the parties if they were happy with notes being taken from the mediation. A Commissioner commented that the community got some comfort from notes being made. Parties may comment on the accuracy of the data recorded. Other Commissioners made no comment on note taking.

Role of mediator

There was also variation in the part the Commissioner played in the parties reaching a settlement. Some Commissioners left it to the parties to work out solutions. Other Commissioners gave suggestions, put forward options, ideas or other ways of looking at things, especially when the parties appeared to have reached a stalemate. The comment was made that the Commissioner was there to assist parties into lateral and creative thinking. This was considered necessary because some participants found this difficult as they could not or did not want to see the possibilities.

7.3.2 Handling power imbalances

All Commissioners recognised that a power imbalance could exist within each mediation. The imbalance could be real or perceived. A Commissioner commented that all parties had some power. The fact that they had got so far in the RMA process indicated they were not weak. Another had been impressed by the ability of community groups and individuals to succeed when they thought they were right, had something to work for and were honest. In some cases, however, the power imbalance was seen as huge.

Usually there was a financial or knowledge imbalance that affected the parties' understanding of the system and their ability to have representation. Another area of imbalance was organisational. For example, a Council with seemingly endless resources, or private sector or citizens groups that had more power than Council through having better qualified people to assist or advise them. Community groups often lacked funds or had not got together in an organisational sense.

A Commissioner had to ensure that any power imbalance did not impact on the mediation process. Some parties came into mediation thinking that they had power or took a stance of power. That power may have come from their position, status or financial resources. Sometimes a company thought they had more rights than citizens groups who appealed. These perceived or real imbalances may or may not have an effect on the mediation. Most Commissioners sought to address the imbalance by empowering the parties. Some parties may be over represented but a minor party could hold its own. If it did not, a Commissioner may ask one party to reduce the number of parties representing it. It was noted that it was personalities rather than numbers that had effect and a Commissioner could sense that. Some groups went into mediation thinking they were disadvantaged but they were not if they knew their information.

Lawyers in mediation

Some Commissioners raised the role of lawyers in mediation as a lawyer's assistance to their client could be seen as creating an imbalance. One Commissioner considered that strong counsel could be sensible and not dominate the process, instead letting the parties do the work and then advise when an agreement was being prepared or ready for signing. Another commented that some counsel helped the situation by using very good skills⁵³. Another Commissioner enlisted counsel to keep the parties inside the law and made them responsible for writing up the agreement. Some counsel, however, were considered to put on a legal show for their clients and the Commissioner needed to use the Courtroom door ('obviously we can't reach an agreement therefore let's proceed to Court') to get them to make an agreement for the parties to sign.

Not all Commissioners considered that counsel should be present in mediation. One expressed doubt about the wisdom of having counsel present because of their role as

⁵³ This may reflect the lawyer's level of instruction and training in mediation. The Universities of Auckland, Waikato, Massey, Victoria and Canterbury offer papers on alternative dispute resolution. Some are taught through the respective Law Faculty.

advocate for their client. It had been noted that some people were in awe of lawyers as they usually go to them for advice. In some instances, the Commissioner felt that the parties might have been able to reach resolution if the lawyers had not been there. A Commissioner can ask lawyers not to be just an advocate for their clients. One Commissioner considered that lawyers had a duty to put the case properly and fairly to the Commissioner, similar to the way an expert witness was supposed to behave in the Court situation. In the mediation situation lawyers were to work towards seeking a solution.

It was believed that it might be easier for a Commissioner to make suggestions regarding the role of lawyers in mediation than mediators from the private sector. One Commissioner believed that their position in the Court helped them in that they had knowledge of and experience in Court and knew what the parties could or should do. Another considered that when mediation was undertaken in a Court setting, the parties heeded what the Commissioner said on account of the Commissioner's position in Court. Commissioners were full members of the Court and Court decisions were by consensus, not by the Judge alone⁵⁴. The next time the parties or lawyer were in Court they may therefore be before the Commissioner, who was the mediator, therefore they heeded what the Commissioner said as their reputation was on the line.

The impact of power imbalances on mediation

Commissioners had noted that power imbalances affected mediation in a number of ways: those who considered they had power would not necessarily listen; they became angry when they considered their power was being usurped in some way; they were less inclined to negotiate or participate and were less co-operative. Sometimes a Commissioner needed to question or challenge such an attitude.

The power imbalance also impacted on the process when parties were not able to present their case properly or had difficulty in a technical sense due to their inability to understand technical or scientific information. Some parties may not have been advised by anyone beforehand so came in with some fundamental misunderstandings. Inevitably it was the Council or applicant, who had a wide range of experts, against community groups who just wanted to preserve their environment. The groups may lack knowledge or be ignorant at a scientific level. Unless any real or perceived power

⁵⁴ S.265 RMA.

imbalances were addressed, people may consider that their ability to participate in the process and achieve a fair outcome had been adversely affected.

The majority of Commissioners thought that power imbalances could be overcome. In every exchange the Commissioner had to consider whether an advantage was being created. One suggested that the Commissioner should try to address this but if they failed the matter should go to the Court. In terms of their perceived role, the Commissioners believed they could redress imbalances in a number of ways:

- Helping the parties understand both the mediation and Court processes by giving them information. When parties understood the process then they were more willing to work at mediation.
- Encouraging a transformative process whereby people were able to see other viewpoints, were given time to think and were not demeaned by the process.
- Letting experts and other parties come in to redress the imbalance. Councils were considered to play an important role in the power imbalance.
- Helping the powerful realise that they had to be willing to co-operate.
- Managing the process so that parties felt at ease. If the atmosphere in mediation was open then parties felt comfortable to tell the Commissioner if they felt intimidated, especially in a private session.
- Asking the parties to focus on the issues and stopping the discussion when it became personal.
- Enabling everyone to have his or her say without interruption.
- Asking lawyers not to be just advocates for their client.
- Getting the parties to be helpful and getting the facts out. In an adversarial situation not all information comes out whereas in mediation all information can be made available.
- Advising parties that they can still go to Court. Costs were possible but costs were not used as a threat to get people to settle.

It was noted that power imbalances could exist prior to or develop during mediation. The Commissioner must work to keep the situation under control so that an imbalance does not develop.

7.3.3 *Matters covered by mediation*

All but two Commissioners said that they raised matters that had not been raised by the parties themselves during mediation. The two Commissioners considered it was up to the parties to work it out and not for the mediator to make suggestions. It was recognised that some disputes may go wider than the appeal grounds that were subject to the mediation. There appeared to be two main ways in which matters, outside those raised by the parties in the proceedings, could be raised.

1. By the parties as discussion occurs.

The parties could raise underlying or side issues. One Commissioner considered that it was totally unwise to limit matters to those under appeal, i.e. solely RMA issues. A number of Commissioners acknowledged that side issues might be the main issues of concern to the parties and the reason for the appeal. Side issues could be anything, were often personal grievances and brought with them the desire for retaliation. They had to be acknowledged and dealt with if progress was to be made.

One situation, where this could occur, was when individuals or groups came in as a s.271A party to the appeal and they could not go wider than the original grounds of the appeal. Side agreements could deal with the matters raised. Memoranda of understanding (gentlemen's agreements) allowed some issues to be dealt with so that trust could be rebuilt and a resolution reached. Such agreements helped 'get rid of the rats in the wood pile'.

2. By the Commissioners.

- Matters were brought to the parties' attention and left for the parties to pursue and work through if they wished. One Commissioner considered that where they saw a possible solution, they had a responsibility to say, '...have you thought of looking at it this way? Is this something that...?' then let the parties work it out and build on the idea.
- Suggestions of possible options or scenarios were made. The comment was made that it was hard to get this right so as to avoid a suggestion of mediation being seen as a directive.
- Seed ideas were sown when it looked like the parties were not going to get there. This may be done in private sessions but the Commissioner had to be careful how this was done.

- If there were practical matters or matters related to the legislation, these would be raised. For example, if there was a reason why the agreement may ‘unravel’ because the parties had not considered a certain point. However, if the parties were moving towards an agreement that may not be workable, one Commissioner indicated they would leave it to be solved later on rather than stop the progress towards a solution.
- Matters that could be fatal to the agreement, in which case the Commissioner would go back to the Judge for legal advice. One Commissioner considered that the Commissioner needed to be very knowledgeable so as to know the alternatives. Another Commissioner considered that they could only raise issues that came within scope of the RMA appeal document.

7.3.4 Purpose of the RMA

The Commissioners were asked if, in their opinion, the purpose of the RMA was recognised and provided for during mediation. The responses varied. Six said that it was, one said sometimes, one said sometimes explicitly, sometimes implicitly. One Commissioner explained to the parties that the agreement would be judicially reviewed for compliance with the statutes and instruments and the rules of equity. Another said they left the purpose of the RMA out of it and worked towards a settlement, leaving it up to the Judge to decide if the settlement achieved the purpose of the RMA. Their view was that the mediator was a facilitator, not a decision maker. In their opinion that was the Judge’s role. Unless there was a blatant disregard of the RMA then it was considered that the Judge would not interfere. Another Commissioner spoke of a bottom line in terms of the RMA that they would not go below. If the parties went below that bottom line then the Commissioner would send the matter to the Court.

According to the Commissioners interviewed, most parties were aware of the purpose of the RMA and gave consideration to it during mediation. Some parties were very aware of the purpose of the RMA, especially interest groups, and they were determined to see certain things were recognised. The Commissioners saw their role in this respect to advise, educate and remind parties of the purpose of the RMA. They may ask the parties, especially if counsel was present, whether or not what was being proposed was possible under the RMA. One Commissioner considered that it was the mediator’s role to keep people within the RMA and get an agreement that the Judge could sign off. If they did not, the parties may consider the mediation had been a waste of time. Three

Commissioners commented that people were usually more concerned with their own private affairs and what was in the agreement for them than with the purpose of the RMA. One Commissioner referred to the permissive nature of the RMA that enabled imaginative settlements to be made within the law.

The Commissioners responses were that most of the time the settlement did meet the purpose of the RMA. Six Commissioners believed that, if it did not, the Judge would pick up on that and the memorandum would be sent back to the parties for reconsideration. Some Commissioners would tell the parties outright that an agreement would not get past the Judge or that it was not an option given the legislation. Others would rely on the Judge to make that decision.

7.3.5 *Outcomes of mediation*

In the literature it had been suggested that mediation could help improve understanding and build relationships. I sought to explore the effectiveness of mediation in doing this where there was a great disparity of the beliefs between the parties. All but one Commissioner had been faced with the situation where there had been a great disparity in the beliefs between the parties. The lone Commissioner suggested that the reason they had not seen such cases was because the disparity was so great that those cases never came to mediation.

The types of disparity identified had arisen as a result of social, cultural and economic conditions and antagonism. The majority of Commissioners considered that mediation helped resolve these disparities by:

- Parties being empowered and given recognition. Their concerns were seen as legitimate.
- Getting parties together to talk in the same room. For some parties this was the first time they had talked together. Initially parties may talk past each other, then talk to each other, and then talk about a solution.
- By helping parties understand that other parties had thought about the issues of concern to them. They had an opportunity to state their mind and endeavour to understand each other's viewpoint. One Commissioner considered that even groups or individuals with strong viewpoints could 'move'.

- Helping parties decide which issues the Court could deal with and which required alternative settlements. Issues may be narrowed.
- Information may be circulated which helped to close the gap between parties.
- Holding mediation in neutral places. There was some difference of opinion on this. Some Commissioners thought the Court location helped the process by being 'in the shadow of the court room door', while others thought it helpful to be outside the formal Courtroom environment.

It was recognised that the courtroom was not an issue in many instances on account of the location of the mediation. Neutral territory was seen as important, e.g. hotels and community halls. Auckland Court now has a mediation room that is separate and considered more user-friendly than the courtroom.

Commissioners recognised that in a small number of cases mediation did not improve relationships or understanding. It was suggested that some parties saw mediation as a short cut and hoped to get an idea as to how their case would go before a Court hearing. Even in those situations it was considered that mediation might help by setting up processes that would aid all participants in the Court process.

Some cases were resolved by mediation, others had the issues narrowed, in others the parties went away and worked out a settlement themselves before it got to Court. In others, the cases ended up in Court or were withdrawn. In some instances cultural differences had to be taken into account. For example, losing face required that a Commissioner allow the parties time to consider and think about options put forward, at the same time making it clear that the parties could come back into mediation.

Mediation brings improved outcomes

In the literature it was suggested that mediation brought improved outcomes. When asked if they believed this had occurred, the majority of Commissioners shared this view. Some Commissioners gave a qualified 'yes'. Their views varied.

- The Court was seen as producing the highest standard of outcome. It was considered that you could get better outcomes from the Court, if cases were well prepared and presented. However, not all parties necessarily did better in Court and some could

lose everything. Mediation brought an outcome by a more comfortable process.

- If the outcome was in accord with the law and was a mutually acceptable outcome, then it may be an improved outcome.
- If mediation enabled an outcome that suited the parties and was something the Court could not arrive at, then in that sense it was better. Mediation, while being a low-key process, could produce or use some quite high quality information.
- If ongoing relationships are created or enhanced through well-managed mediation then it may be an improved outcome.

7.4 The future of mediation

All Commissioners supported the use of mediation. It was seen as:

- A suitable process for dealing with many cases that come before the Court.
- Promoting the enabling philosophy of the RMA.
- Having standing and formality as a process when set up by the Court. People have to front up and face the issues. The Judges can deal with points of law.
- Enabling issues to be resolved to the mutual satisfaction of participants and without recourse to a major hearing.
- Allowing the parties to take ownership of the outcome and have their say in an environment that enabled and encouraged that. For some parties, even if the outcome is not what they want, they have done their best, had their say and affected the outcome.
- Enabling all parties, even the least resourced, to have their say without being talked down to by lawyers or sneered at.
- Enabling outcomes that could not be imposed by a higher authority.
- Reaching resolution quickly where there is repeated mediation with similar groups, as can happen with plan references. The disadvantage is that the Commissioner may become too familiar with the parties.

Commissioners considered mediation would be a major dispute resolution tool in the 21st century because of costs. Costs were seen as scaring people and deterring them from participating in RMA decision-making processes. The RMA had created a huge industry. For example, nine people (three parties plus a lawyer and planner) were estimated to cost \$50,000 for one day in Court. Some Commissioners thought that mediation would be and should be used increasingly. It was contended that many, but not all, cases before the Court were suitable for mediation. The Court, by facilitating mediation, gave it standing and formality as a process. It was considered that if a Judge suggests mediation then the Court should provide a mediator. The free mediation service currently being offered by the Court was seen as positive for all participants.

On the other side, a few Commissioners expressed the view that by suggesting mediation, the Court was suggesting to the parties that the case was not really important enough to worry the Court and take up its time. Asking the parties if they had considered mediation made counsel aware that the Court thought the parties could sort out the issues and there was no need for the Court to be involved.

All Commissioners considered mediation should be voluntary. Mandatory mediation was not considered to be mediation. If people did not want to mediate, they would be much less willing to try and reach resolution, thus wasting the Court's and participants' time and money. Mandatory mediation was seen as draconian and could generate further antagonism in the community before a Court case. It was considered that already some people could be coerced into mediation.

Some Commissioners suggested that the Court should work towards very strong encouragement of mediation. Possible ways would be: a conference call or mediation type meeting where the mediation process could be explained. Where cases were taking a long time to get to Court then the Judge could say '...do you think it would help if one of the Commissioner's had a session with you to see if you might be able to mediate something?' or '...we think these issues may be resolved by mediation. We'd like you to think about giving it a try. If you try and it doesn't work, then go to the Court and the Court will decide.'

One Commissioner saw mediators doing the bulk of the Court's work. They recognised this may not be what the Judges wanted to hear but, with the large backlog of cases before the Court, something had to be done. Others saw mediation making up to 50% of a Commissioner's workload. Commissioners would continue to be facilitators and

should continue to conduct mediation. They were mobile and flexible. It was questioned whether a mediator needed to sit on the bench in order to be better able to handle mediation through their knowledge of what was acceptable or possible under the RMA. Commissioners also assisted the parties to communicate. It was believed that often the issues have come to the Court because people have failed to communicate earlier.

In future more joint mediation may be used where there were a large number of parties. Regarding the provision of a court mediation room, the benefits were considered to be: no accommodation costs (assuming the Court bears the cost); it emphasises the neutrality of the venue and has the stamp of the Court. It also has the integrity of the Court and is not seen as a jack up between two strong parties, as can be the case if a mediation is held in a Council venue or legal office, as sometimes happens outside the Court centres. For this reason only Court mediators should use the Court mediation room in order to maintain the integrity of the Court process.

It was suggested that the Commissioners should be given power by the Judges to do simple things on their own. It was believed that this could be possible if there was no law involved, e.g. a mediator could do the adjudication. It could be that mediation becomes a binding decision without going back to the Judge. The matter of legal training for mediators was raised but considered to be unnecessary.

7.5 Summary

All Commissioners had gained knowledge of mediation through training and had gained experience by conducting mediation. The standard training for Commissioners, funded by the Court, was LEADR in conjunction with or as a supplement to other forms of specific training. Commissioners recognised the need for training. The majority of Commissioners saw the role of the mediator as primarily a facilitator of the mediation process. However it was not confined simply to that role but varied from facilitator to evaluator depending on the needs that arose during mediation.

The pre-mediation action taken by the Commissioners varied. Some had no contact with the parties until the day of mediation, leaving it to the Court. Others rang or wrote to the parties. The Commissioners' role at the start of mediation was seen as setting the ground rules for the mediation process and outlining the process. The parties may or may not be involved in designing the mediation process. Some matters, such as confidentiality, small group discussion and the power to sign, gave rise to some variation in treatment.

During the initial stages of the mediation the issues are outlined, discussed and possibly prioritised. Parties then worked through the issues. Private sessions may be used to allow the parties time to work through information. The Commissioner may join these sessions and, at times, act as a go-between for the parties. Real or perceived power imbalances were recognised to exist and could impact on mediation. Commissioners sought to address these, but recognised that they were not always successful.

The role of the Commissioner, in helping the parties reach settlement, varied. Some Commissioners left it to the parties; others were active in stimulating lateral thinking. There was an awareness that any suggestions made during mediation should not appear as a directive to the parties. Matters that related to the law or considered fatal to the agreement were raised. Notes were taken during mediation but there appeared to be no consistent approach. Reservations were raised in the context of note taking, in particular the potential for any notes to impact the without prejudice nature of mediation.

The majority of the Commissioners considered that the purpose of the RMA had been recognised and provided for in the mediations they had conducted. Most parties, particularly interest groups, were aware of the purpose of the RMA and wished to see certain matters recognised. Commissioners might remind the parties of the need to keep within the law as defined in the RMA. Some Commissioners relied on the Judge to be the final arbiter of whether or not the purpose of the RMA had been met.

All Commissioners supported the use of mediation and could see its use increasing in the future for financial reasons. All agreed it should be voluntary and that it may not be appropriate in some cases. The legislation had given Court assisted mediation standing and formality as a process.

Chapter 8: Perspectives of the Participants in Court Assisted Mediation

8.1 Introduction

All the ten participants interviewed had the experience of being involved in cases that had been resolved through Court assisted mediation. I was privileged that they agreed to an interview and allowed me, through my questions, to revisit what had, for some, been a significant experience in their lives. For those participants, my questions not only revisited their mediation experience but also touched what I would describe as 'RMA scars' - the personal and/or perceived impact of a compromise or failure to secure a desired outcome. In these instances, a considerable amount of feeling still remained despite the time lapse since settlement. This type of disclosure meant that additional time was required to work through these situations. As a consequence, in many instances, interviews took longer than anticipated.

Frequently the interview questions caused the participants to make unprompted comments on matters beyond those sought in the questions. Common courtesy dictated that I listen to each participant's viewpoint. Consequently I did not prevent people from sharing their perspective and experience if they so wished. It appeared that some participants appreciated the opportunity to honestly express their opinion of the mediation process on the condition of anonymity being retained. I have included the additional comments of participants in my findings where I consider they relate to mediation in the Environment Court.

8.2 An overview of the Environment Court assisted mediation process

The interviews with participants explored similar areas to those covered with the other stakeholder groups. This section brings together all participant responses so as to gain an understanding of how the process was being undertaken from the viewpoint of the participants.

8.2.1 Pre-mediation phase

Decision to enter mediation

There were a number of reasons given by the participants for deciding to enter into mediation.

- Cost

The majority of participants gave this as a reason for entering mediation. The importance of cost in the decision to mediate varied. For some individuals and community/iwi representatives, it was the main reason for entering mediation. For others, such as Councils, it was one of several reasons, while for one party, an applicant, cost was not an issue at all. There were three aspects raised in relation to costs. They were:

The cost of going to Court

The majority of participants were aware of the potential cost of taking their case to Court. An experienced participant⁵⁵ considered most parties did not want to get into Court because they knew the cost of doing so. Court costs were seen as significant unless a party could represent themselves. Some first-time participants indicated that their legal advisers or other parties, such as Council, had advised them of the potential cost of Court. Costs of say \$20,000-\$45,000 were seen as horrendous. Some believed they did not have the resources for either legal advice or Court action. Even when a legal adviser at a community law centre considered a case winnable, the cost of bringing the case to Court had caused a first-time participant to settle in mediation.

The fear of costs

Some individuals or community/iwi groups had been advised that the other parties would pursue costs in Court. They had been told that the Judge might award costs against them if they lost the case. For a few first time participants the fear of this happening existed throughout mediation. It was recognised that such an award could financially break a party. In one case a community/iwi group had been asked to show their ability to pay costs in the event of their case failing in Court. They had found such action intimidating and believed this was intentional.

Cost saving

Some Council and community/iwi representatives considered that money spent on Court proceedings was an unwise use of resources. The cost of going to Court to settle a number of references on Plans (Regional or District) was considered significant. It was an issue for some Councils especially those with a large number of referrals, such as with a District Plan. Mediation offered a significant cost saving for some Councils.

⁵⁵ Experienced participant: A participant who has participated in more than one mediation.

A Council representative estimated that it could cost in the vicinity of \$20,000 to present a case in Court. When multiplied by the number of references, this constituted a substantial amount of money. It was considered sensible to try to resolve some issues through discussion. Council representatives commented that some people viewed the lodging of a reference or appeal as a means to have another go to amend the Plan. In some cases it worked but other times it did not as a Council was limited in the extent to which it could make changes.

One community/iwi representative commented that, as ratepayers, they were aware that they and other ratepayers eventually had to pay for Council going to Court. They recognised that Court action was a drain on Council's limited resources and therefore sought to resolve the dispute by alternative means. That way the money saved could be put towards the community.

- Speedier process than Court

For one participant (an applicant) speed, not cost, was the primary consideration. They wanted the dispute resolved quickly so they could get on with their business.

Mediation was seen as being quicker than the Court process with its projected delay at that time of 12-18 months. In the case of a Council, speed was a consideration but not the only one. The majority of referrals on a Plan had been negotiated. Mediation was seen as a way of getting disputes over the Plan settled more quickly and getting the Plan operative.

- Preferable form of dispute resolution

Some participants represented Councils and community/iwi groups that took the approach of trying to resolve disputes by mediation, even if they considered the likelihood of mediation succeeding was small. If the parties in a dispute wished to mediate then they would participate. Mediation was seen as being quicker than going to a Court hearing. It was also friendlier, less adversarial and less costly in terms of money, staff time and the parties' time. In the case of a Council, preparation for a Court hearing was seen as diverting staff away from their work, thus taking valuable staff time, and to be avoided if possible. One Council representative considered mediation was a participatory or consultative process with the intention of getting to a resolution.

One participant believed that mediation with an independent third party would help clarify the issues in contention and increase understanding of the dispute. Two thought that the issue appeared to be one that could be resolved without going to Court and therefore mediation should be tried.

- Improved decision-making

One participant considered that all parties would get a better result from mediation than from the Court. It was believed that mediation potentially enabled a win-win situation. The Court was perceived as being less flexible. In the Court the parties were no longer managing the outcome and there were winners and losers.

- Avoiding the Court

From comments made by participants during the answering of the prepared questions, it became apparent that, particularly for first time participants, the Court system was perceived as 'frightening'. Several first time participants commented that the Court was not a place where law-abiding citizens usually went. The parties opposing them had let them know their intention to pursue costs, should the case fail in Court. These first-time participants had believed such comments, felt threatened and intimidated by them and settled.

- Potential outcome

One participant had been advised of the likely outcome of their case, basically if they failed in Court then they would go back to the original position prior to the Council hearing. This advice had distressed them as the dispute involved their livelihood and was, understandably, dominating their life. For that reason they decided not to go to Court but to see if they could gain an improvement in the situation through mediation.

Preparation for mediation

I asked a number of questions to ascertain the source and type of information the participants had at their disposal prior to mediation, any additional information that they considered would have been helpful to know and who, in their opinion, should supply such information.

Sources of information about the mediation process

The participants surveyed ranged from the informed and experienced to the uninformed and inexperienced. The majority of participants had had previous experience with mediation.

Of the first time participants, two had relied on their legal advisers for information. A Judge had suggested mediation to another participant who subsequently relied on the 'little bit' of information given in the letter sent out from the Environment Court. Two other participants had relied on word of mouth and/or friends for advice. These participants considered they had to learn about mediation, and any associated rules, as they went along while other parties did not. The first time participants considered that participation in mediation would have been easier if it had been made clear what was involved.

When responding to this question, one experienced participant offered the comment that, when they first went into mediation, they were unfamiliar with the process and the powers and functions of the mediator. They considered the Court did not give clear advice regarding these matters in the information it circulated. This particular participant had found, from subsequent experience, that many people were unfamiliar with the Court assisted mediation process and did not know about the functions and powers of the mediator.

Helpful information to know before mediation

- About the process

Four first time participants thought it would be helpful to know how the whole Environment Court process worked so they could decide whether to go into mediation or put their case before a Judge. Useful information was considered to be: appearing before the Judge, how the Judge would treat the parties and the mediation process. One participant commented that later, after seeing an Environment Judge in action on another case, they believed they could have handled the Court process.

Several first-time participants commented on the nature of the information required prior to mediation. They considered independent information should be available from a 'regional' (community) law office. It should explain what to expect in mediation, what happens right through to the end of the mediation process and how to go about it.

Any information should be written in such a way that the average person in the street could understand it without having to use a lawyer. For an inexperienced layperson the process, with its uncertainty, was ‘mind-boggling’. The documents or correspondence circulated were heavy reading and the time frames often short. One participant acknowledged that other parties might have been more experienced in reading such material.

One experienced participant thought it would be helpful for participants to know that mediation was not a decision-making process, that it was not like litigation but was simply a process to facilitate discussion towards resolution. They considered that there should be some document that set out how mediation was undertaken, e.g. closed sessions with the mediator, and the confidentiality of mediation.

- About the mediator

Four experienced participants made the following comments about the role of Commissioners in mediation. It was considered that the role of the Commissioner should be clarified. Parties should be able to choose the mediator, especially when a Commissioner was used repeatedly to mediate disputes involving the same or similar parties. Not all parties were comfortable with using the same Commissioner. One participant had gained the impression in a subsequent mediation that the Commissioner had formed an opinion regarding the wisdom of the parties pursuing the matter in mediation and saw the matter as frivolous. Mediators should be competent, familiar with the legislation, able to bring a sharp focus to the debate and able to give parties direction if they seemed to be moving away from a solution or off the topic.

An experienced participant had noticed that the style of the Commissioners varied. For example, one Commissioner may require that all parties remain in the room until an outcome is agreed upon and require them to have power to sign on the day. Another Commissioner may allow the parties to go back, over night, to their respective organizations or groups and get agreed positions on matters before signing. If the particular Commissioner, and thus style, had been known prior to mediation, some participants indicated that it might have affected how they approached mediation and who was sent to represent them. It was pointed out that not all organizations gave full delegated authority to those attending mediation. Maori groups indicated that they

would very seldom, if ever, have delegated authority and must go back to their iwi/hapu for approval before signing off.

Helpful information to know during mediation

First time participants considered they needed more information during the mediation process and that participation would have been easier if it had been made clearer what was involved. One suggested it would be useful to have a legal person to bounce matters off. Lawyers, representing other parties, were seen as being helpful while the mediator was there but not so helpful outside mediation. Several raised the difficulty of assimilating and responding to information in a very short time frame. Time was needed in order to understand both the information and the implications. The pressure to make decisions compounded this problem. In a multi-party mediation, one participant considered that individual face-to-face meetings to talk about their specific concerns could have resolved their dispute straight away.

Affect of information on participation in mediation

I enquired whether the participants considered the availability of information had influenced their role or participation in mediation. Responses here varied from no change from the experienced to taking a more assertive role in mediation or bypassing it for the Court from the first time participants. Three participants considered it was very important that other parties were open and willing to listen to different viewpoints. Unless that willingness was present, mediation was seen as pointless and, as one individual put it, you might as well stand and talk to the mirror in the bathroom.

Preferred information provider

As to how participants should find out about mediation and what is involved, responses ranged from 'don't know', 'someone in the bureaucracy', 'someone independent, maybe the Court' to the Regional Council, District Council, Court or MfE. Six participants thought the Court should provide information. As one participant commented, 'the Court is promoting mediation therefore they should give information'. However another commented that 'anything to do with the justice system requires a lawyer and that costs'. They did not necessarily think the Court should provide information. Another commented that the Government was making laws that people could not understand, that required money [to buy expertise] to understand and 'it shouldn't be like that'. Another commented that any information should be written in

plain English, not by a university graduate. 'You want it in everyday English so that normal people can understand it without having to refer back to somebody else or a lawyer to understand it'. Some first time participants indicated that they could not understand some of the information they received or it took time and re-reading to understand.

One first time participant suggested that if parties had gone through a Regional Council 'mediation' [s.99] they would be familiar with the process. Environment Court assisted mediation was seen as 'just another round in the fight'.

One participant commented that they had been aware the Court encouraged mediation as much as possible. One Council representative considered that the Court sending out a letter regarding the option of mediation was 'fine' because it was a Court process. It would be better if there were support from the Court in the form of information about the mediation process. This information could say that if the parties were not prepared to move then mediation was not for them. Another Council representative commented that perhaps some people did not understand the process and felt obliged to enter mediation. The tone of the Court's current letter made people feel obliged to enter mediation even though they did not want to move their position. So parties went into mediation to be in the best position if the case went to Court otherwise the Judge might not view their case so favourably. Awareness of the Court's high caseload was also mentioned. One non-Council participant considered support should be given to groups and individuals so the process, with the associated legal profession, did not intimidate people. Ratepayers were, through their rates, paying for the people who were employing 'top-notch' legal aid to oppose them.

8.2.2 The mediation process

I asked the participants how mediation was conducted and their involvement in aspects of the process, such as selection of the mediator, deciding the process and drafting agreements. I also sought to understand how they perceived the process.

Selection of the mediator

None of the participants were involved in the selection of their mediator. The Court allocated the Commissioner. Some issues arose with the selection of the Commissioner. The repeated use of a particular Commissioner was commented on. Concern was

expressed that a party asking for a different Commissioner may be seen as questioning or challenging the Court and might get the Court's 'back up'.

One case had used a Commissioner to resolve the majority of issues then the parties brought in an outside mediator to finish the 'wash up' issues after a lengthy mediation. The parties had shared the cost of the mediator and one participant considered that cost sharing brought a level of commitment that had not been there before. The mediator had limited time to resolve the issues and worked long hours to get resolution. The comment was made that when people realise they have limited time and are pushed into a corner then they make decisions.

Confusion could obviously arise when the parties to a private negotiation asked for Court assisted mediation. One first time participant was not aware that a Court appointed mediator had been brought in to facilitate mediation. During the interview it became apparent that the participant was confused about the role of the Commissioner, thinking the Commissioner was the Judge. Another matter raised by a participant was the Commissioner's prior knowledge of the parties. A Commissioner had rung one of the participants prior to mediation and said that if they knew any of the parties they could not take the case. No other participant mentioned this matter.

Preparing an understanding of the process

The perception of the participants in each of the cases researched was that the Commissioners decided how the mediation process was to be conducted with no input from the parties. All Commissioners outlined to participants how the mediation would be run. Some Commissioners then asked if the parties agreed. Some participants commented on the fact that there were no minutes kept of the mediation so nothing to refer back to. They had to rely on what they thought the Commissioner or other parties had said. This approach was considered problematic as the process was seen as 'pretty impromptu', 'fluid' and 'like walking on jelly' with the particular parties. At the start the lack of structure was not seen as a problem but in hindsight it was considered to be a problem. It was considered that it would have been an advantage to have something defined because of the acrimonious relationships between the parties in dispute.

Role of the Commissioner

Participants explained their understanding of the role of the Commissioner in various ways - facilitator, coach, listener, analyst and reconciler. Their responses showed that the Commissioners' approach varied. The majority of participants considered the Commissioner initiated discussion of the issues, sought the parties' views, listened, looked for common views and worked to bring resolution. Some Commissioners had gone beyond the role of facilitator and had made suggestions, tried to point the parties in the direction of resolution and advised the parties whether the settlement would satisfy the Court. Participants had noted that the issues and views being expressed by participants did not appear to be important to the Commissioner.

Other aspects of the Commissioner's role commented on were:

Time to consider matters

All participants considered the Commissioner facilitating their mediation had given parties time to consider the matters being raised. Some allowed lengthy breaks during mediation, e.g. half an hour, while others limited the time. Seven participants thought the time allowed was adequate. Parties had been allowed time to go away and think about matters. In one case, the parties determined the time needed and held a Hui. Other participants expressed concern at the limited time allowed for considering proposed agreements or settlements. Some parties were required to have power to sign on the day and were not allowed time to return to their organisation for approval. This was an issue for some Council and community/iwi representatives who may come to the end of their limited delegated authority during mediation. Some Council representatives commented that Commissioners may ask them in small group discussions to make concessions that might create a settlement but they did not have the freedom to do this.

*Side issues*⁵⁶

Some issues raised during mediation were not part of the reference or appeal yet parties had wanted these side issues resolved before they would agree to a settlement. Council representatives made the following comments. The parties may not have had a problem

⁵⁶ Side issues: those matters that do not form part of the original reference or appeal.

Side agreements are any agreements that are entered into to obtain the written approval of an affected person. They occur in a variety of settings, take a number of forms and are initiated for a number of reasons ranging from avoiding notification of an application, or seeking to mitigate adverse environmental effects, to realizing opportunities for making a financial gain. (PCE, 1998, p.v).

with the original decision but would not withdraw the appeal or reference until the broader issues were addressed. This was considered to be an abuse of the Court mediation process but no Commissioner had been heard to say this to parties. It was believed that Commissioners were delegated to resolve certain matters and had no authority to go outside these. Council representatives had no ability to meet some of the wider concerns raised as side issues unless there was a law or policy change. A Commissioner could, in the closed sessions, put pressure on Council representatives to resolve the issues ‘...what can we give them to resolve the issue’. This was seen as asking a Council representative to do what Council could not do. If such a situation occurred in Court, the Judge would say that it was beyond the scope of the appeal. It was considered that the Court, in attempting to get resolution, was mediating on everything and this was beyond or outside its authority. Mediation could therefore go from being very focused on the actual appeal or reference to being very broad. It was suggested that the Court should make clear in the preliminary information that parties in mediation must ‘stick to the main issues’, i.e. those under appeal, not the broader issues.

Record keeping by the Commissioner

Some Commissioners used whiteboards, if available, to write up notes during mediation. The majority of parties did not receive any written record of what had been discussed or decided during mediation although, in one case, both the Commissioner and Council had kept and circulated notes. Four participants (Council, community/iwi and individual) considered there should have been a formal record kept so as to avoid misunderstandings, misinterpretations and the need to recover ground when mediation was reconvened. One considered the Commissioner should keep a record, as they were independent.

Without records, everything was open to challenge. Parties may agree verbally to a course of action but when the mediation was reconvened nothing had been done. The mediation seemed ‘to go back to square one and the mediator allows that to happen’. It was considered that the Commissioner needed to summarise what the various parties had agreed to do, let the parties see this then get them to sign. If there was nothing on the ‘to do’ list then the Commissioner should question whether the parties should proceed with mediation. Some participants believed that sometimes mediation failed because of this lack of commitment. It was suggested that signing off in phases, or as

each issue was dealt with, would avoid this happening and would give closure on resolved issues. One community/iwi representative considered the mediation process was in danger of being compromised due to the overall lack of formality.

Some participants had observed Commissioners making notes. Some Commissioners advised the parties they were taking notes as they had to report to the Court but the parties did not see these notes. Others did not tell the parties what they were going to do with the notes. One participant commented they had no problem with note taking if it benefited the process, but they were concerned if side agreements were documented, such as money being paid to get a party to withdraw an appeal.

Mediator giving information or suggesting approaches

Eight of the participants had been in mediation where a Commissioner had given information or made suggestions as to possible approaches. Some considered this information helpful. Others did not appreciate the advice, especially when it related to whether or not the case should continue. Parties did look to the Commissioner for guidance in some matters such as Court processes and whether the proposed settlement would 'get past' the Court. This was defined as a 'reality check'.

Drafting and circulation of agreement

This aspect of the process was looked at on a case-by-case basis because of the different participants' perspectives. All participants were aware of an agreement or memorandum being drawn up. In two cases Council had drawn up agreements with the involvement of the parties. In the third case all the participants had a different understanding of who had actually drafted the agreement. Circulation of the document also varied. In two cases a Council undertook circulation. One Council representative commented that they realised the need for resolution so undertook to draft, circulate and modify the document so agreement could be reached. It was unclear who had done this in the third case as no consistent response was given.

Dynamics within the mediation room

Impact of mediation on parties view of the issues in dispute

Participants were asked to indicate if their view of the issues in dispute had changed. Only one considered this happened. Of the remainder, three indicated their views had not changed despite their gaining a better understanding of the issues and the sincerity

of the other parties. Another responded ‘definitely not’ while another said the mediation had actually made them more opposed than previously.

Recognition of issues of concern by other parties

Four considered that the other parties had recognised their issues of concern, at least verbally, with two considering it was ‘lip service’. Two participants were unsure if their issues of concern had been recognised by other parties while another four considered this had not happened. One participant in a multi-party mediation considered that their issues were not aired as the mediation concentrated on the concerns of the main groups and individuals were forgotten about.

During the interviews reference was made to the strong personalities, dominant characters, strong or extreme viewpoints and intransigent attitudes present in mediation. Participants also raised the matter of lacking trust in the other parties. Some had difficulty believing what the other parties said, on account of their past experience.

Power imbalance

The majority of participants considered that a power imbalance existed in their mediation and impacted their participation. They were divided as to whether or not this affected the final outcome. The power imbalance could be created by a number of factors:

- A knowledge or information imbalance

Some recognised that the power advantage lay with them in the mediation as they had legal and professional capabilities that the other party or parties did not, plus logic and the law on their side. As several put it, it was the resourced and/or knowledgeable versus the under resourced and/or less knowledgeable. Despite this imbalance, one Council representative considered that even the under resourced parties had power and leverage in the situation and knew how to use it. So the power imbalance could, in some instances, be perceptual rather than real.

- A numerical imbalance

One Community/iwi representative made reference to the number of parties, with their legal and technical experts, ‘stacked up against’ them. Their perception was that it did affect the final outcome. However the other ‘powerful’ party in the same mediation

considered that the supposedly weak party had leverage and knew how to use it to the 'nth' degree.

- A legal imbalance

One Council participant considered there was an imbalance because of the law. For example, Council could not depart from an Operative Plan that had been through a public process. The Commissioner realised the situation and gave the possible Court scenario. All parties in this case recognised that this imbalance had affected the outcome.

- A financial imbalance

Councils were seen as well-resourced agencies coming up against community/iwi groups or individuals with limited or no resources. One participant raised the cost of participating in mediation. Time off work, especially for the self-employed, photocopying of information to share in mediation, travel costs, even being appropriately dressed were issues. As they put it, that, plus the lack of information about the process and the RMA, meant 'we had used up half our energy before we even got there (to mediation)'. They believed if they had more money they would have achieved more. Another participant considered if they had the money they would have gone straight to Court, 'I would have camped outside the door'. An experienced participant considered there was an element of wearing down the less resourced parties to the point where, in the end, they would settle. A party might be happy with the settlement because they were afraid of going to Court. It was believed that intimidation sometimes did come into it.

Comment was also made regarding lawyers in mediation. A lawyer could be useful if they assisted their client towards an agreement. However, when acting as advocate for their client, they were in an aggressive position. A lawyer could be seen as 'hedging their bets' by getting information for later use in the Court. Mediation was considered to be all about trust and the presence of a lawyer could sometimes undermine the level of trust.

Perceived procedural advantages of the process

Only two participants thought the process did not advantage one party over others, with one of those parties considering that the Commissioner did 'level the playing field'. Of

the remainder, two participants considered the weaker groups/individuals gained an advantage in that the dispute was given the Court's scrutiny without the cost of going to Court. They believed the groups/individuals had either got something they actually could not afford (i.e. court scrutiny) or the deal was better than they would have received in the Court. The reason for this was that their case was weak or they lacked resources to put together a good case.

Some, the groups/individuals with limited or no legal and technical resources, saw the process benefiting anyone who had knowledge and knew the system. The resourced participants thought the less resourced groups used leverage. One participant considered the process worked for those who were vocal but recognised these parties did not necessarily speak for the majority.

In each case it was interesting to note that generally the experienced, resourced participants considered that mediation had been fair and the outcome satisfactory while the inexperienced with limited resources believed they had been disadvantaged in the process and were dissatisfied with the outcome.

Pressure to make a decision

All but one participant considered there was pressure to make a decision. The one, who said there was no pressure, considered there was a desire to work towards a solution rather than pressure. Participants noted that pressure to make a decision could come from a number of sources. The sources mentioned were:

- The Court with its time constraints and setting down of other appeals.
- The Council who, during mediation, communicated its desire to get a plan reference settled so that the Plan could become operative.
- The applicant, who wanted its consent confirmed so it could proceed with its plans.
- The parties themselves who felt under pressure (self-imposed) to gain something, as they could not afford to go to Court.

Some participants recognised that the pressure was on all groups, while others considered it was unique to them. One participant commented that some pressure was necessary otherwise the matter would never get resolved.

8.2.3 Post mediation

Expectation of the mediation process

The majority of participants entered the mediation process with expectations. All Council representatives considered their expectations of the process were realistic. Two community/iwi/individuals said their expectations had not been realistic, another did not have any, one 'hoped' rather than 'expected', another said their expectations were not high as this was their second mediation.

For six, what they expected and what happened coincided, some more quickly than others. Of the remainder, the behaviour and actions they expected were not fulfilled. They considered their input was ignored and they felt intimidated and pressured to agree. One thought there would be a more specific agreement. One participant summed it up by saying that their expectation that everything would be resolved in mediation was unrealistic. The inference from their comment was that some things might not be able to be mediated.

View of the mediated outcome

The response to this question varied. Six of the participants accepted the outcome as either successful, good or correct with an acceptable or satisfactory resolution. All Council representatives considered the outcome good. Two community/individual participants saw the outcome as acceptable or satisfactory. Four participants were dissatisfied with the outcome and used such terms as 'insufficient', 'totally dissatisfied', and 'rubbish-been conned'. It was apparent they had learnt much through the process and would perhaps not settle so quickly in the future.

The purpose of the RMA

The range of responses to my question about whether or not the mediated settlement met the purpose of the RMA varied, depending on the participants overall knowledge of the RMA. 'What is the purpose of the Act?' was one question in response to mine. Six participants believed that it had been met. The four disagreeing were the same four who were dissatisfied with the outcome of their mediation. From their comments it became apparent they had a particular view of the purpose of the RMA, e.g. sustainable development, environmental protection, recognition of and provision for Maori values, and they considered that the settlement had failed to achieve that.

Awareness of the way the law was being interpreted and applied presumably helped some participants. Those participants (community/iwi groups and individuals) without this knowledge had worked out their own interpretation. The promotion of the RMA as user friendly, participation enabling legislation may have been a factor in participants taking this approach. For example one individual shared their understanding of sustainable development during the interview. Some participants were disappointed with what they had been told in mediation was possible under the law.

The mediated settlement was a workable solution that will last

All but three of the participants considered the mediated settlement would last. Several did comment that the mediated settlement would only last if the parties were prepared to work at it and meet their commitments. One participant remarked that it would take hard work, effort and understanding between parties to ensure this happened. Some parties acknowledged that the matter might be revisited when the Plan was reviewed.

Renegotiation of the settlement

Opinion was divided on this with varying degrees between 'uphold completely' and 'complete review'. Some considered that, once a settlement had been reached, it should be upheld so that all parties had some certainty. Some considered that it should be upheld but if circumstances changed, e.g. some part was broken or there was a fundamental flaw or scientific advances, then it should be able to be renegotiated. The majority supported the inclusion of review conditions in agreements. However reservations were expressed regarding open ended, undefined review. It was considered that people had worked hard to reach the agreements and wanted them upheld. Some participants recognised that the substantive issues within their mediated settlements would automatically come up for review, e.g. Plan review, so they knew they would have an opportunity to re-open the debate on these issues in the future.

Authority of the parties in mediation

All but one party considered that those with the authority to implement the outcome were present throughout the mediation. Again the matter of delegated authority, particularly for Maori and Councils, was raised. Several participants indicated they had almost reached the 'no' point in mediation, i.e. they were at the end of their delegated authority and would have to go back to their superiors for greater authorisation. Delegated authority had, for some parties, been defined or confined to the issues in the

appeal and they could not go outside those issues. Maori did not have delegated authority and had to report back to the Tangata Whenua who then made the decision.

8.3 The cost of participating in mediation

8.3.1 Financial

All but one party had put a figure on the potential cost of participation in a Court hearing prior to entering mediation. Costs were estimated to range from \$5,000 to \$260,000+, the latter being a multi party Plan referral. Most gave \$10,000 as an estimated minimum. Some had been given figures by the other participants or it had been suggested by a Commissioner that it would be very expensive. What it actually cost to participate in mediation varied. For some it was time, mileage and several hundred dollars. For seven it was under \$4000, with five of those \$1000 or under. For two, costs exceeded \$10,000 ranging up to \$150,000 for a multi party mediation.

One individual commented that a party to an earlier appeal had advised them that the Court awarded about a third of costs claimed. It was therefore advisable for participants to make their claims 'good' so that when the Court cut the claim back, the party got a 'reasonable amount'. It could therefore be expected that when inflated cost figures were mentioned to opponents they would be considerable. A number of participants verbalised their fear of costs and indicated that the threat of Court costs being awarded against them was there throughout the mediation.

One Council representative considered that, in some instances, it might be better for a Council to go to Court, particularly for disputes between neighbours. Often these were neighbourly rather than RMA disputes. It would be cheaper and quicker to write evidence and spend half a day in Court. Mediation could be left for the big cases where preparing evidence alone could cost \$50,000- \$100,000. Mediation in those situations would enable the parties to get agreement on the issues, allow the narrowing of issues in dispute and reducing the need for evidence.

8.3.2 Time

The time taken in mediation ranged from days to months. The majority of participants thought the time taken was worthwhile, some qualifying this with 'definitely' and 'frustrating but worthwhile'. One Council representative commented that, while a settlement had been achieved, the matter should not have been before the Court in the first place therefore it was a waste of time in that respect. Three community/iwi

representatives and individuals thought mediation was not worth the time taken but they had learnt lessons through the process. As one participant put it, they now knew how to adapt and participate effectively.

8.4 Participants view of mediation

Despite their experience and criticisms of the process, all participants would, in future, promote and encourage the use of mediation for resolving environmental disputes.

Some qualified their support for mediation in the following ways:

- Mediate but do not settle if you are unhappy with the outcome. Go to Court if you consider you have a defendable case. Seek professional guidance on that.
- Always seek to mediate unless the parties are diametrically opposed or the dispute involves an issue that is non-negotiable, e.g. the integrity of an operative Plan.
- The Commissioners must run the process in a tight, efficient manner, i.e. keep records, so time is not lost re-covering ground.
- Ensure that, if mediation fails, the case can quickly go before the Court.

8.5 Suggested improvements to the mediation process

At the end of the interview I asked participants for any suggested improvements to the mediation process. The majority made suggestions. They were as follows:

- The actioning of references and appeals by the Court within weeks and months rather than years. Time was important to businesses.
- The availability of information regarding the various settlement options in the Court prior to the decision to enter mediation.
- The provision of written information on the mediation process so the parties have a better understanding of what happens in mediation.
- Preparation by the Crown of a basic guide regarding Maori participation in mediation.
- Providing a neutral environment for mediation, thereby removing the home ground advantage.
- Providing competent, trained mediators.
- Making mediation quicker by ensuring it does not drag out over time.
- Taking a more community friendly approach, e.g. creating a two-tier system that keeps lawyers out in the first round of discussion, as they are often aggressive or adversarial.

- Requiring parties to sign and abide by a written mediation protocol.
- The keeping of formal records to record progress.
- Working out the boundaries of confidentiality.
- Commissioners giving a reality check or steer as to what the Court would accept.
- Having a neutral legal adviser and technical adviser in mediation.
- Quickly moving failed mediations in to another process, e.g. Court hearing.

8.6 Summary

Most participants viewed mediation as a way to save money and time. Cost was a significant factor in the decision to enter mediation for a number of reasons, the main ones being the cost of taking a case to Court; the fear of costs being awarded against unsuccessful appellants and the drain of Court action on the ratepayer body at large. The majority of participants viewed the Court as expensive, adversarial, inflexible or frightening.

In terms of their understanding of the mediation process, participants split into two main groups - those with knowledge of and experience in the mediation process and in a position of power (authority/financial) and those without. Lack of knowledge of the Court system in general, and the mediation process in particular, was widespread. Some participants considered this lack of knowledge had an impact on mediation. Some participants saw written information on the process as desirable. Experience appeared to help participants gain a realistic understanding of the mediation process. Participants' expectations of the mediation process, whether realistic or unrealistic, may well have contributed to their satisfaction with the mediated outcome.

Commissioners were seen as undertaking certain core facilitative roles, although not all participants considered they fulfilled these roles satisfactorily. Some Commissioners were seen as going beyond that role by offering suggestions for resolution or giving an opinion on the possible outcome if a case went to Court. The resolution of side issues was seen as being beyond the sphere of the reference or appeal and therefore the Commissioner's mandate. Some participants considered they did not have the authority to resolve such issues and should not be asked to do so by a Commissioner.

In some circumstances mediation increased the parties' understanding of the issues in dispute. It did not always build trust between the parties. It was recognised by a number

of participants that trust might develop as mediated settlements were honoured and upheld. It was considered that settlements would require commitment and hard work to implement. The renegotiation of settlements drew a range of comments with some participants believing that they would be able to revisit the issues in their dispute at Plan review.

There were a number of areas where improvements could be made which would enhance the credibility and effectiveness of the mediation process. Discussion of these is incorporated into the general discussion of findings in the next chapter.

Chapter 9: Discussion of Research Findings

9.1 Introduction

This chapter evaluates Environment Court assisted mediation using the criteria set out in Chapter 4. It also considers the implications of the findings for the continued use of mediation as a method of resolving environmental disputes in New Zealand. It is argued that modifications to the current practice in Court assisted mediation would enhance the effectiveness and public perception of the mediation process.

9.2 Evaluation of the mediation process

Based on the literature review in Chapters 2 and 3, a number of criteria were identified as prerequisites for successful mediation (Refer para.4.2, page 44).

They were:

- Parties' entry into mediation was voluntary.
- Parties were competent to participate, i.e. informed and prepared for mediation.
- On going participation in mediation was voluntary.
- The mediator upheld natural justice and the process was procedurally fair.
- The parties were involved in face-to-face discussion.
- The mediator was competent to undertake the mediation.
- Those with the authority to implement the outcome were present in mediation.
- The outcome of mediation met the purpose of the RMA.
- The mediated settlement was a workable outcome that parties considered would last.
- Participation in mediation resulted in time and cost savings.

These criteria will be used to evaluate the mediation process based on the research findings presented in the previous four chapters.

9.2.1 *Entry into mediation was voluntary*

The interview results indicated that all participants considered they had entered mediation voluntarily. Moore (1996) has suggested that actions can be taken that amount to pressure on parties to enter mediation. I looked to see if this may have occurred. As noted in Chapter 5, mediation is being promoted within the justice system generally. Information from the Court and in publications produced by MfE and other agencies would tend to confirm that parties are actively encouraged to consider mediation. A letter from the Court suggesting mediation, questioning at callover regarding mediation, an explanation of mediation or suggestion to mediate by the

Judge, had given some participants the impression of a strong encouragement for mediation by those administering the RMA. This encouragement, combined with prior threats regarding legal costs by opposing parties, security for costs and the cost of preparing a case for Court, reinforced the use of mediation in the cases I investigated. It could therefore be concluded that, while parties' chose to enter into mediation, some prior actions may have strongly influenced or exerted pressure on them to do so. Some of this pressure may have arisen from incorrect assumptions on the part of participants.

9.2.2 *Parties were competent to participate*

The competency that was looked for related to: the participants' ability to put their case; the knowledge they had of the mediation process so they could utilise its provisions for greatest benefit, and the level of support (technical/ legal) they had at their disposal. Interview results showed a wide range in the level of participant competency. Council representatives could be considered to be competent as they were informed, had technical/legal support and were experienced in mediation. However they too had once been inexperienced in mediation and had expected greater guidance from the Court. It was assumed that Councils selected officers who are competent communicatively to represent them in Court procedures. Groups or individuals with legal advisers were considered competent due to the information and experience their legal advisor brought to the process.

Those groups or individuals without legal/technical advice had a limited level of competency. Many of the factors identified in Chapter 2 that affected participation were identified during the interviews. Some participants recognised their limitations with respect to understanding the process and their ability to read and assimilate legal and technical information (particularly proposed settlements), in a short space of time. The presence of technical staff intimidated some participants initially. Commissioners had noted this 'intellectual' imbalance in mediation and sometimes sought, with the parties' agreement, to reduce the number of technical advisers present. Some participants used experiential and historical rather than technical information to support their viewpoint and felt it was given limited recognition by other parties. Some Commissioners did not consider these limitations insurmountable. They had observed that, even without a high level of competency, parties were able to achieve worthwhile gains from mediation by working at the process and being honest.

9.2.3 *On-going participation was voluntary*

All participants remained in mediation until the matter was resolved. As noted in the participants' findings, the pressure imposed by a possible Court hearing motivated some participants to keep working at mediation. At least two participants indicated that they would have gone to Court if the Court procedure was not so slow or they had the financial resources. This indicates some parties chose to stay in mediation because their BATNA was unattractive or, in some instances, non-existent rather than because they favoured mediation as a process.

9.2.4 *Natural justice and procedural fairness*

The mediation process, as outlined in the interview results, could be considered to uphold natural justice and be procedurally fair in the following ways:

- All parties had an opportunity to attend mediation and put their viewpoint if they so chose. Some individuals may not have used that opportunity to the fullest where more communicatively competent parties were present.
- Commissioners sought, where possible, to redress imbalances but not all imbalances could be redressed.
- The time allowed to consider proposals during mediation was adequate in most situations, although some participants considered it to be insufficient when it came to the final settlement.
- There was an element of ethicality as Commissioners had taken an oath of office to honestly and impartially perform the duties of their office (s.256).
- The parties were not forced to settle by the Commissioner but felt pressured by external and personal factors.
- The Commissioners were perceived as impartial. Only in one instance did a participant consider that the Commissioner was, by urging settlement, siding with another party.
- Commissioners worked to help the parties create a settlement that reflected the agreement. They did not necessarily draft the agreement.
- The extent of self-determination was limited in that the mediated settlement had to be approved by the Judge, therefore was constrained by the provisions of the RMA.

The process did not, however,

- Provide consistent rules in all aspects of mediation.
- Have a clear code of ethics for both Commissioners and participants.

- Guarantee the accuracy of the information used in decision-making.
- Always overcome the potential for bias in terms of class, due to the level of competency required and
- Provide grievance or appeal procedures for parties who believed that there was bias or the process was unjust.

9.2.5 *Face-to-face discussion*

All but one participant chose to attend all the mediation sessions. The participants who attended mediation indicated that it had increased their understanding of the matters in dispute and other participants' views and concerns. One participant commented that they 'saw them as people' rather than the opposition. This indicates that mediation did 'transform' some situations. The majority indicated that their attitudes on the particular issues in dispute had not changed.

It became apparent during the interview with the participant who chose not to attend all mediation sessions, that there were still strong feelings regarding the issues in dispute. Attending mediation may have helped create understanding of the issues and provided this participant with an opportunity to express their concerns to the wider group.

9.2.6 *Mediator competency*

The Commissioners could be considered competent to conduct mediation in that they had, through training, gained knowledge of mediation. The training sessions funded by the Court were short courses held over a matter of days. The Commissioners' ability to conduct mediation was increasing with 'hands on' experience.

In New Zealand, the variable nature of training, standards and ethics has raised the question of whether or not there should be a minimum standard or curriculum for all mediation training (Forbes, 1995, p. 416; Powell, 2000, p. 419). It is therefore possible that candidates for the position of Commissioner may have gained their knowledge of mediation through training courses that varied in content and standard. Requiring candidates for the position of Commissioner to have a minimum standard of training followed by practice would ensure a basic level of competency in mediation is acquired before Commissioners enter the Court.

9.2.7 Authority of parties to resolve the dispute

The matter of the parties in mediation having authority to sign a mediated agreement on the day generated some discussion, particularly as Commissioners had been found to take different positions on the matter. The Commissioners' position in this matter may determine whether or not parties participate in mediation⁵⁷ and their choice of representative in mediation. Participants therefore wanted to know the Commissioner's position prior to mediation as not all had full authority to sign off the mediated agreement during mediation. Some Council representatives were given limited delegated authority and, when that point was reached, had to go back to Council for further authority. Maori representatives were not given delegated authority but had to go back to the Tangata Whenua for approval. Consistency of approach by the Commissioners would appear highly desirable.

9.2.8 Purposes of the RMA

The recently published MfE guide on mediation states that the Judges have the power and responsibility to ensure that any consent order is, among other things, consistent with the purpose of the RMA (MfE, 2001). The research findings showed that the Judges did not explicitly refer to the purpose of the RMA when signing off agreements but rather referred to 'appropriate' in RMA terms, creating a 'satisfactory environmental result' and a 'responsible outcome in RMA terms'.

Overall, the majority of stakeholders considered that mediated agreements met the purpose of the RMA. Both Commissioners and participants believed there were instances when this goal was not met. Some Commissioners and participants expected the Judge to decide whether or not a settlement met the purpose of the RMA. This expectation may be unrealistic, given the limited information available to the Judge when considering a mediated agreement as well as the various criteria they use prior to signing a consent order. The parties are responsible for creating the mediated agreement. It may, however, be unrealistic to expect parties in mediation to think beyond self-interest to the purposes of the RMA, although a Commissioner may try to get them to do this. This may be difficult, as some participants did not know what the purpose of the RMA was or had different opinions as to what s.5 meant.

⁵⁷ Anecdotal evidence is that some Council representatives cannot meet such a requirement, made by a Commissioner prior to mediation. Mediation is being declined for that reason.

9.2.9 *Settlement was a workable outcome that will last*

The majority of participants considered that the settlement would last. Some qualified this by saying that it would take hard work, effort and understanding to achieve this. Others indicated they would revisit the matter through the appropriate statutory Plan review or resource consent review process. This indicated that the matter in dispute, while settled, was not in fact resolved and participants would seek to reopen the matter if another opportunity arose. There was a belief that review of Regional and City/District Plans and review clauses in resource consents enabled this to happen.

9.2.10 *Participation benefits*

Cost saving

Cost was given by all but one participant as a reason for entering mediation. The interview results showed that Court assisted mediation enabled a range of environmental disputes to be resolved at a reduced cost compared with the anticipated cost of litigation. In some instances the cost saving was considerable, e.g. a Council resolving a multi party dispute over their Plan. Some participants believed they could not afford the cost of going to Court. For others, the cost of litigation combined with the threat of costs being awarded by the Court, influenced their decision to mediate, as noted earlier. Some participants were aware that taking disputes to Court was a financial cost to all ratepayers and considered that this was an unwise and unproductive use of ratepayer funds.

Even though the Court paid for the services of the Commissioner and the venue, there was a financial cost involved in attending mediation, preparing documentation or undertaking information gathering. For some participants meeting the cost of participating in mediation was difficult.

The emphasis on costs indicates that mediation is seen as a more affordable form of dispute resolution. It does not necessarily mean that justice is achieved, as an under resourced party may have a valid case, defensible in Court, but makes compromises in mediation because they cannot afford a Court hearing.

Time saving

Mediation could take days or go on over months. The majority of participants thought the time spent in mediation was worthwhile. A minority considered that mediation had

been a waste of time - either the matter should not have been on appeal (based on their assessment of the law) or the outcome did not meet their expectations. The response of one participant indicates that shorter time delays in the Court may mean that some parties may, in future, decline mediation in favour of a Court hearing.

Improved and more appropriate outcomes

The participants were asked for their view of the mediated outcome. The majority thought the mediated agreement was 'successful', 'good', 'satisfactory' or 'acceptable'. A small number were dissatisfied with the outcome.

Rebuilding trust between disputing parties

It is believed that trust is built when parties understand each other. Mediation is believed to help improve understanding as parties listen to each other's concerns, discuss information and aspirations, and work towards a solution that creates mutual gains. In the interviews it became apparent that, while mediation had helped some participants gain a better understanding of the issues in dispute, the majority of participants' attitudes and views had not changed. Trust had not immediately been restored or built as a result of mediation. It was considered it may however develop over time as mediated settlements are honoured and upheld by the parties.

On whether the other parties recognised issues of concern to a particular party, some believed there had been recognition at least verbally, while others considered it was lip service only. Openness and flexibility was difficult for some participants because of strongly held or entrenched views. Participants indicated they understood what the other parties were wanting but it did not change their attitude or stance. Mediation could therefore be considered to build understanding but not change attitudes. It may be unrealistic therefore to expect parties to a dispute that has been going on for some time to develop understanding, build relationships and restore trust in the space of a day or less.

9.2.11 Summary

The Court assisted mediation process, as presently undertaken by the Court, has enabled an increasing number of environmental disputes to be resolved in a way that meets the prerequisites for successful mediation. There are however limitations in the current

process. These benefits and limitations are outlined in the following section. Specific recommendations are then presented in the following chapter.

9.3 The benefits of Court assisted mediation

On the basis of the research findings presented above, Court assisted mediation as currently practised offers a number of advantages for stakeholders.

The Court

Section 268 enables the Court to use mediation as an additional method of dispute resolution within the RMA. The Court can, by suggesting to selected parties that their case may be suitable for mediation, act as a catalyst for getting the parties to consider and enter mediation. By narrowing the issues in dispute or resolving the dispute, mediation can reduce the number of cases awaiting determination by the Court or reduce the time spent in Court hearings with their associated cost to the Court. Given the backlog of RMA cases presently before the Court and the concerns about the associated time delays, mediation is a means of relieving pressure on the Court.

Regional and District Councils

Mediation saves ratepayer money in a number of ways. It avoids the considerable financial cost of litigation and staff are not diverted away from their routine work to prepare for a Court hearing. It is less adversarial than the Court and is in accord with the philosophy of co-operative resolution followed by some Council's and Maori groups. The Councils are seen as working co-operatively with ratepayers rather than fighting them with ratepayer money.

Applicants

Mediation enables a dispute to be resolved in a matter of days rather than waiting up to 12 months for a Court hearing. This time saving can create considerable financial and personal benefits for the applicant as the issue is resolved and they can get on with their life or business.

Community groups and individuals

The Court provides the services of Commissioners to conduct mediation at a mutually acceptable venue free of charge. Participants may ask the Court to conduct a mediation or the Court may suggest to the parties that a dispute may be a suitable for mediation.

The cost difference between mediation and litigation is significant. Mediation therefore offers a less costly way for parties to continue to pursue their interests in Court. It also allows parties to be actively involved in reaching consensus decisions in matters which affect them, thereby increasing support for the implementation of the outcome. In some instances, the Commissioners were able to redress power imbalances to achieve a more equitable outcome. The non-adversarial, co-operative nature of the mediation process enables the sharing of participants' viewpoints in a controlled and safe environment and helps increase understanding of both the issues and the viewpoints of other parties.

9.4 The limitations of Court assisted mediation

Court assisted mediation is constrained in a number of respects, as demonstrated in the findings of this study. The RMA has left the procedures relating to the administration and implementation of mediation undefined in law. It is to be expected that where a relatively new decision making process is incorporated into legislation with little or no legislative guidance, some problems of implementation will arise. The monitoring of mediation was advocated prior to the introduction of the RMA to enable mediation procedure to develop in the light of practice (Chart, 1988). Procedures have developed but without the benefit of the insight gained from monitoring. The research findings identify a number of limitations in current practice that if addressed, could enhance the process thereby maximising the benefits of expenditure of taxpayer funds on Court assisted mediation and enhancing the environmental outcomes. These are as follows.

Consideration of the public interest

Reference was made to the 'public interest' by both Judges and Commissioners when considering the assessment of cases for mediation and determining whether to allow mediation to continue. In that no specific reference is made to the concept of public interest in the RMA, apart from s.274, it is assumed that the Judges were referring to the public interest as implied in s.5 of the RMA and the policies and rules of regional and district plans.

The findings showed that while a Judge may not suggest mediation because of the wide public interest aspect of the case, they would not refuse mediation in such a case where parties sought it, as it may narrow the issues, leaving the core issues to come to Court. It is unclear how the Court can ensure that the wider public interest is considered or represented in mediation unless a party representing the public interest comes forward

under s.274. It is unclear how a s.274 party would know that mediation is going to occur, as they are only required to advise the Court of their wish to appear ten working days before a hearing. It has been recognised that parties may not provide for the public interest during mediation and for that reason the Court does not necessarily approve a consent order (Sheppard, 1997).

Criteria for assessing cases for mediation

Under s.268 the Environment Court (Judges and Commissioners) may ask that mediation be conducted. The legislation leaves it to the Court to decide when to ask. The criteria looked at by Judges when assessing cases for mediation varied, as did the trigger point for suggesting mediation. There appears to be a perception that some Judges are more 'pro' mediation than others, the implication being that one Judge may have a lower threshold for suggesting mediation than another. Public comment by Judges may have created this perception (Sheppard, 1997, p. 20; Bollard *et al*, 1998; Kenderdine, 1999, p. 16). In that Commissioners are also part of the Court and could suggest cases for mediation at callover, some guidance would appear desirable to ensure consistency of approach on the part of Judges and Commissioners when suggesting cases for mediation.

Participation in mediation

Mediation is promoted as being a voluntary process with parties entitled to refuse mediation in favour of having their case heard by the Court. Interview results indicate that Judges do not view disputes any differently if mediation had not been tried or had been tried and failed. Case law suggests a less lenient approach. Some participants had gained the distinct impression that the Court was strongly in favour of mediation and it was wise to enter mediation for that reason. The Department of Courts supports the greater use of mediation as a strategy for managing the Court's considerable workload and estimations are given in the Annual Forecasts of the number of cases that will be handled by the Court in any one year. It has been suggested that the provision of mediation by the Court may mean busy Judges are tempted to press parties to mediate in order to reduce the Court's workload (Naughton, 1995, p. 381). One Judge did refer to the impact pressure of work sometimes had on the assessment of cases. It is therefore possible that Judges may be tempted to suggest mediation on account of their high workload, the requirement to meet projected outputs (Department for Courts, 2001,

p.31) and the overall endorsement of mediation within the Court system. No indication, however, was given by the Judges that this was the case.

A Judge's 'suggestion' of suitability for mediation or explanation of mediation could be misinterpreted as a 'direction' or considered 'process compulsion' in that it was unsolicited by the parties (Forbes cited in PCE, 1996, p. 51). The parties can gain the impression that they should be able to resolve the issue and the case is not worth the Court's time. The desirability of Judges suggesting mediation is therefore questioned. Information that clearly explains the Court assisted mediation process may remove the need for Judges to suggest or explain mediation to parties. For that reason, a standard letter to all parties to Court proceedings, setting out and explaining all the dispute resolution processes available and advising of the Court's free mediation service appears preferable to Judges suggesting to selected parties that their dispute may be suitable for mediation. A suggested alternative, supported by some parties outside the Court, is compulsory consideration of the case for mediation rather than compulsory participation in mediation (Forbes, 1995).

S.271A parties

The interview results indicated that Judges considered all parties would have to agree to mediation for it to proceed. Such a requirement may, however, give undue power or leverage to one party, such as a s.271A party. It was suggested that a s.271A party should have to show the Judge why a consensus agreement should not proceed. Such a requirement may put pressure on parties to mediate. It also is unclear whether or not a Judge can refuse a s.271A party's explanation and require them to enter mediation or accept an agreement.

Commissioner interaction with Judges during mediation

Interaction by the Commissioners with the Judges during mediation varied. It is recognised that Commissioners may require guidance in some matters during mediation but the source and extent of this advice is unclear. Some parties may be uncomfortable with the Commissioner discussing the mediation with the Judge due to 'without prejudice' considerations. At least one participant was aware of a Commissioner discussing the case with a Judge.

Selection of the mediator

Presently the Court decides the mediator (a Commissioner) with no input from the parties. The only basis for trust and confidence in the Commissioner by participants appears to be trust in the Court system and the Commissioners' position within it. The repeated use of the same mediator may or may not help create a climate of trust. In some situations, such as Plan references, repeated use of the same Commissioner may develop familiarity among some parties (with both positive and negative consequences) or be questioned by a party. It is possible that, where a party questions the Court's choice of Commissioner, that party may be seen as challenging the Court. No procedure appears to exist for handling such situations.

Competency of the mediator

Given the Court's encouragement of ADR, the strategic role of a Commissioner in Court assisted mediation, and the significance of the disputes that are being resolved by mediation, Commissioners need to be trained, experienced and competent in mediation prior to their appointment to the Court rather than gaining it while holding office.

Preparing an understanding of mediation

The majority of parties did not consider they were involved in preparing an understanding of the way in which the mediation was to be conducted. The preparation of an understanding prior to mediation, however, would have enabled the various cultural and personal viewpoints and circumstances of the parties to be acknowledged and accommodated. It would also have provided guidance for participants and could be used as a reminder by the Commissioner during mediation. Participants indicated that they were looking for greater certainty with regards the process.

Record keeping and note taking

Note taking during mediation arose in three contexts, that of recording the progress of mediation, participant note taking and Commissioner file notes.

- Record of progress

In the majority of situations Commissioners did not keep records of the progress made in mediation. Participants considered records would help avoid misunderstandings, prevent revisiting matters, assist the parties when drafting a settlement and avoid wasting time.

- Confidentiality and note taking

The scope of confidentiality in the Court is unclear as individual Commissioner's interpretation of confidentiality varied. The informal way in which confidentiality is agreed to in Court assisted mediation, and the comments of participants would suggest that the observation 'In reality...mediation is not as confidential as it is sometimes claimed to be' (Boulle *et al*, 1998, p. 277) has an element of truth in Court assisted mediation. An expectation that parties will respect confidentiality may be unrealistic and unenforceable should the parties decide to publish details (Goldblatt, 2000). Parties may become unwilling to enter mediation or share information during mediation if the information may later be used against them (PCE, 1996, p. 61; Goldblatt, 2000). The signing of a confidentiality agreement prior to mediation, such as the model agreement provided by AMINZ, would clarify this matter for the parties.

- Commissioner file notes

The nature and extent of file notes and their impact on the 'without prejudice' nature of the mediation process is not clear. It is left to an individual Commissioner's discretion as to what they include in the file notes. Such notes could be considered to be prejudicial to any future action by some parties. One Judge considered that such notes should be kept confidential. Some Commissioners felt uneasy at the possible depth of information supplied and it has been noted that not all are completing the file notes (Dougherty, W. pers.comm.). Given that the Court has refused access to a mediator's notes on the Court files (See *Mortimer v Whangarei District Council* CO23/97), it is desirable that a Commissioner indicates the broad general nature of the contents of any file notes to parties so as to avoid claims of prejudice. It is unclear whether or not the Court requires a private mediator, who is asked by the Court to conduct mediation under s.268, to complete a file note.

Honesty

The interview results raised the issue of the motives of parties in seeking mediation. Parties can use mediation to obtain information for use in another context. One Judge commented that, providing the parties were sincere in their request and there were no hidden agendas, they would assist them and arrange mediation. It is unclear how a Judge could assess that parties are sincere and there are no hidden agendas, as parties do not, at any stage prior to or during mediation, take an oath to tell the truth.

Side agreements

Side agreements appeared relatively common and were used to resolve issues of concern that were hindering the resolution of the issues by mediation. Any side agreements reached during mediation did not come under the scrutiny of the Judges. It has been recognised that side agreements, while compensating the present parties, may not mean better environmental outcomes for the wider community or future generations (PCE, 1998).

Lodging proceedings in the Environment Court can be a way of gaining leverage to resolve other outstanding issues that are not part of the substantive appeal. It was suggested in informal discussion with RMA practitioners that, by and large, Councils want to avoid the cost of going to Court so will settle out of Court. Appellants can therefore use this desire as a lever to get various concessions from Councils. Participants expressed concern about the use of mediation to resolve issues that were outside the scope of the original appeal, believing this was an abuse of the mediation process. Some participants felt pressured during mediation to make concessions, beyond their authority to do so, to resolve side issues. The enforceability of side agreements may also be questionable. Parties may therefore settle mediation based on an incorrect premise. The Court has expressed reservations about the practice of parties entering into side agreements (See *Bellaney v Christchurch City Council* C140/99)

Transparency in all aspects of Court proceedings would appear highly desirable, given the nature and wider implications of environmental disputes. If side agreements are common and are the reason for settlement under the RMA, then it would appear desirable that they are noted and made part of the public record so that the parties responsible can be held accountable. The PCE has suggested that requiring disclosure of side agreements under the RMA may minimise the practice (PCE, 1998) and may discourage the mediation process being used for leverage. It would also make clear to the public, that reasons other than RMA considerations were responsible for the settlement.

Judicial action when signing off a mediated settlement

The interview results showed there was a perception, reinforced by the MfE publication on mediation, that the Judges undertook a form of 'quality control' when the documentation was put before them at the completion of mediation. A form of quality

control is undertaken but it would appear difficult for a Judge to decide that 'issues have not been dealt with superficially or that some parties have been intimidated into an agreement' as suggested in the MfE publication, given the varying level of information contained on the file (see above).

There is no guidance in the legislation about the criteria to be considered by the Judges when signing off mediated settlements. The interview results showed there was a range of matters looked for by Judges when considering a mediated settlement. Consistency is desirable. The Judges may not make a 'decision' regarding the mediated settlement meeting the purpose of the RMA, contrary to what some Commissioners and participants thought. For participants to make such an assumption indicates they have misunderstood their role in the mediation process. If participants are in doubt over the outcome meeting the purpose of the RMA then mediation should be concluded and the matter put before the Court

Implementation of the settlement

Some participants believed there would be an opportunity to re-open debate on the issues within their mediated settlements when statutory review was undertaken, e.g. Plan Review. This raises a question concerning the circumstances in which a mediated settlement is no longer valid. It has been suggested that mediated settlements may be able to be revisited but this has not been clearly spelt out in the legislation (Bollard *et al*, 1998). If mediation continues to be promoted and suggested by the Court, then consideration needs to be given to a system for addressing any grievances that arise from the mediation process.

Recording of consents by the Court

The change in Court administrative procedures, requiring the recording of all consent orders as decisions and Commissioners completing a file note, may enable more accurate data on mediation to be collated in the future. It is anticipated that this administrative change will lead to an increase in the number of decisions recorded after 2000. This increase could be misleading unless the way in which the recording system operated prior to 2000 is fully understood.

The variable approach to recording settlements taken prior to 2000 is considered to be unsatisfactory for three reasons.

First, the Environment Court is a Court of record, which implies that the decisions and settlements signed off by the Court are recorded and accessible to the public, thus upholding the principle of open justice (McDowell *et al*, 1995, p. 232). It is highly desirable that all mediated settlements are available for public scrutiny so that justice 'can be seen to be done' (Mulholland, 1991).

Secondly, public participation in resource management has been encouraged under the RMA. Any member of the public can, under the open standing provisions contained in Part XII of the RMA, seek the enforcement of decisions or consent orders. Consent orders therefore need to be made public so that the wider public can, if they so wish, ensure that all parties uphold them.

Thirdly, the effect and implementation of mediation needs to be monitored to ensure consistent outcomes and enable the mediation process and procedures to develop, as intended by Parliament. Variation in the practice of mediation under s.268 could lead to inconsistent environmental outcomes that are not in accord with the purpose of the RMA. Monitoring would identify any variation. It is uncertain who should undertake such monitoring. The MfE considers there is no explicit requirement for any party to monitor the effect and implementation of mediation under s.268 of the RMA. The monitoring of 'the effect and implementation of the RMA' by the Minister for the Environment, under s.24, is considered to be a generic function (MfE, pers.comm. 2001).

Private mediators

The increased use of Court assisted mediation has the potential to impact on the function of the Court with Commissioners seeing their involvement in mediation increasing. There is a need to ensure that Commissioners are available for Court fixtures. These fixtures determine the availability of Commissioners and the timing of mediation. It may therefore be necessary for the Court to use private mediators in the future to meet the demand for mediation services. No guidance is given about the terms under which private mediators would operate under s.268 RMA.

Information needs of parties

The general public perception is that the Court has rules and codes of conduct. These are assumed to apply in a 'court' mediation process and were looked for by

participants. By clearly setting out the mediation process and procedures followed when facilitating Court assisted mediation, the Court would be seen to be following fair and consistent participatory processes. Such an approach is required of local authorities and the Court when conducting hearings under the RMA.

Any publication on mediation needs to clearly and concisely answer the information needs of readers. Participants indicated that they diligently read information, looking for guidance about the process on which they had embarked. For some participants preparing for mediation was not their primary occupation and was done in their 'spare time'. For that reason, reconsideration of some aspects of the MfE publication on mediation may be necessary (MfE, 2001, p. 13). As this is the only publicly available publication on environmental mediation in New Zealand, greater consideration needs to be given to the requirements of the target group. A survey of parties, who have been sent the publication by the Court, could provide insight into further areas where improvements could be made.

9.5 Conclusion

Based on the review of the research findings presented in this chapter, the next chapter briefly summarises the findings of the study and makes recommendations for good practice guidelines.

Chapter 10: Summary and Recommendations for Good Practice Guidelines

10.1 Summary of research findings

Environmental conflict is inevitable given differing social, cultural and economic expectations and values. The ability of traditional dispute resolution mechanisms, such as litigation, to handle complex environmental disputes has been questioned. The support for and application of ADR techniques such as mediation has increased in the past 30 years. Within many nations, including New Zealand, ADR has received statutory recognition.

In the past decade mediation under s.268 of the RMA has been used increasingly as a way of resolving environmental disputes in New Zealand. No monitoring of the effect or implementation of mediation has yet been undertaken under s.24 of the RMA and the full extent of the use of mediation is unknown. Recent changes to Court administrative procedures have the potential to enable a more accurate assessment to be made in the future.

Court assisted mediation is endorsed by the Court and is considered by Judges during case management. The legislation gives no guidance on the way in which mediation is to be conducted. In the absence of legislative guidelines, Judges have initiated mediation conducted by a Commissioner. Commissioners have drawn on their experience and information obtained from mediation training sessions when conducting mediation. When mediation is completed, the Judges have signed off mediated settlements using their own interpretation of the law and experience to assess the settlement. The practice of Court assisted mediation is therefore developing over time and variations in practice are occurring. These variations can create uncertainty for participants, impact their participation in mediation and the effectiveness of the mediation provisions in the RMA.

Until 2001, there was no readily available information on the particular way in which mediation was conducted in the Environment Court. This lack of information has impacted on the way in which some parties prepared for, and subsequently participated in, mediation. In some instances it could be considered to have impacted on the mediated settlement. Variations in the practice of mediation may also impact the

consistency of environmental outcomes. Matters such as those recommended in the good practice guidelines need to be addressed if the mediation process is to ensure equitable and consistent environmental outcomes, in terms of present and future generations, and retain public confidence as a process.

10.2 Recommendations for good practice guidelines

This study has shown that the way in which the Court assisted mediation process is currently being administered and conducted has limitations, some of which are impacting on the participation, effectiveness and satisfaction of parties. Other writers have also identified a number of these limitations. It is therefore recommended that changes be made to the way in which the Court currently fulfils its responsibilities under s.268. It is believed that environmental mediation under the RMA would be enhanced by the incorporation of the following suggestions into Court procedures and practice thereby enhancing resource management decision-making in New Zealand.

10.2.1 *Guidance on Environment Court processes*

There is a need for greater understanding of the way in which the Environment Court operates. It is recommended that all parties to references or appeals lodged in the Court be advised of all the various ways in which the Court can resolve matters. Consideration needs to be given to the appropriateness and adequacy of existing publications on the Court's functions. Any revision needs to bear in mind the information needs of the potential users. An in-depth explanation in a readable style of the nature of and way in which the Environment Court conducts various dispute resolution procedures, such as hearings and mediation, is necessary.

10.2.2 *Guidance on mediation in the Environment Court*

It is recommended that *A Guideline to Mediation in the Environment Court* be prepared by the Court which clearly sets out the particular process, protocols and rules the Court follows when initiating and conducting mediation. The current publication by the MfE (MfE, 2001) gives a general explanation of mediation but does not specifically define the Court assisted process. Participants are still left without written guidelines on how the Court process will be conducted or the particular protocols that apply. It is considered that the nature of the mediation process as conducted by the Court needs to be explained and defined, to create consistency in the approach promoted by the Court

and to inform parties so they can prepare for effective participation in mediation. Such a guideline should cover the following matters:

- (i) The nature of the mediation process as conducted by the Court.
- (ii) Entry into mediation, in particular, when it may be suggested to parties and the implications of such suggestions.
- (iii) Commissioner selection, their position within the Court, credentials and role in mediation. Possible Court response where parties do not wish to use a particular Commissioner.
- (iv) Commissioner contact with the parties prior to and during mediation.
- (v) The purpose of pre-mediation meetings.
- (vi) An outline of the phases in the Court assisted mediation process.
- (vii) The role of the parties in defining the mediation process.
- (viii) The ground rules for mediation including: the Court's expectation of parties; a code of conduct for Commissioners and participants; good faith bargaining; respect for other parties; openness to listen and consider other viewpoints; confidentiality; note taking; private meetings and power to sign.
- (ix) The nature and extent of Commissioner record keeping during mediation.
- (x) The role of a Commissioner in any subsequent hearing.
- (xi) The role of s.5, the purpose of the RMA, in mediation.
- (xii) The legal nature of mediated agreements and how they are enforced.
- (xiii) The nature and enforceability of any side agreements.
- (xiv) Any mediation grievance procedures.

10.2.3. *Guidelines on the Court's administrative procedures*

It is recommended that the Court standardise its procedures with respect to the following matters:

- i) The criteria considered by Judges when initiating mediation or signing off a mediated settlement.
- ii) The code of conduct governing Commissioners when acting as mediators.
- iii) The nature and extent of any records made by Commissioners.
- iv) The recording and indexing of consent orders issued by the Court.
- v) The codes of conduct governing private mediators when asked by the Court to conduct mediation.
- vi) Noting the existence of side agreements in consent orders.

10.3 Recommendations for further research

Matters that require further investigation are:

- (i) The adequacy of the Court assisted mediation process in ensuring the representation and consideration of the public interest.
- (ii) Monitoring of the effect and implementation of mediation under s.24 RMA.
- (iii) The extent to which private mediators are being used to resolve references and appeals in the Environment Court and the way in which they conduct the process.
- (iv) Whether or not procedures are required to address grievances with the practice of mediation.
- (v) The way in which the negotiation of references and appeals are conducted under the RMA.

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Interview questions for stakeholders

A Structured interview questions for Judges

Process

1. What process do you go through when you first see a new case?
2. In that process, do you assess that case for mediation?
3. How do you decide a case is or is not suitable for mediation?
4. If you decided a case is suitable for mediation, what happens then?
5. If you decide a case is not suitable, what happens then?
6. What do you do if the parties are unwilling to mediate?
7. If you decide a case is unsuitable for mediation, what do you do if parties request mediation?

During the mediation process

8. Do you have any involvement while a case is being mediated?
9. If you do, what is it?

Outcomes of mediation

10. When signing off mediated cases, what matters do you consider?
11. Are there any matters in particular that you consider must be present in a mediated settlement?

View of mediation

12. Given the Court's current role in mediation as discussed above, do you think there should be any changes made in the process?
13. If so, what should these be?

B Structured interview questions for mediators

Training

1. Have you had formal training in mediation? Specify.

Role of the mediator

2. What do you consider is the role of the mediator?
3. What information about the mediation process do you give participants prior to and during mediation?
4. How is the mediation process conducted? What is the role of parties in defining this process?

Power imbalances between parties

5. Have you observed power imbalances between mediating parties?
6. Do you consider this imbalance has impacted the mediation process?
7. Do you consider that the outcomes of mediated settlements met the purpose of the Act?

Matters covered by mediation

8. Have you ever raised matters, outside those raised by the parties, which you consider should be covered? If yes, what type of matters?
9. Was the purpose of the Act recognised and provided for during the mediations you facilitated?
10. During the mediation process did the parties give consideration to the purpose of the Act?
11. Did you consider that the outcomes of mediated settlements met the purpose of the Act?

Outcomes of mediation

12. Have you been involved in mediation where there is a great disparity of beliefs between the parties in dispute?
13. Did mediation help to resolve this disparity? In what ways?
14. Was that dispute able to be settled by mediation or did parties resort to alternative means of resolution?
15. It has been said that mediation brings improved outcomes? What is your response to that statement?

View of mediation

16. What are your views on mediation?
17. Should mediation be voluntary or mandatory?

18. What role do you think mediators should have in the future?

C Structured interview questions for participants

Decision to enter mediation

It is suggested that parties have various reasons for entering mediation.

1. Why did you enter mediation?
2. When preparing for mediation, what was your source of information about the mediation process?
3. In hindsight, is there any information about mediation that would have been helpful to know before/during mediation?
4. Do you think this information would have influenced your role/participation in mediation? How?
5. How do you think parties should find out about mediation and what is involved?

The mediation process

It is suggested that the mediator is very important for the success of the process.

6. Who selected your mediator?
7. Did the participants draw up an understanding of how the process was to be conducted prior to entering mediation?
8. What was the mediator's role in your mediation?
9. Did the mediator keep records of the proceedings? Were the parties advised of the contents of these records?
10. Did the mediator give out any information or suggest approaches for parties to consider during mediation?
11. Was a memorandum of understanding drawn up? Who did this? Who circulated it?

The dynamics within the mediation room

12. Did your view of the issues in dispute change as a result of mediation?
13. Do you think your issues of concern were acknowledged by the other parties?
14. Do you think there was a power imbalance between the various parties? If yes, do you think it affected the final outcome?
15. Do you think there was pressure to make a decision?

16. Do you think the process worked to the advantage of some parties and not others?

The mediated agreement

17. In hindsight, were your expectations of the mediation process realistic? What did you expect? What in fact happened?
18. What is your view of the mediated outcome?
19. Do you think the outcome met the purpose of the Act?
20. Do you consider the mediated settlement is a workable solution that will last?
21. Do you consider mediated settlements should be able to be renegotiated?
22. Were those with the authority to implement the outcome present throughout the mediation?
23. Did you have authority to make decisions during mediation?

Recommendations for improvements to the mediation process

24. How do you think the mediation process could be improved?

Time taken

25. Over what period of time did mediation take place? - Days, weeks, months, years?
26. Do you consider the time taken in mediation was worthwhile?

Cost of participation

Mediation is often suggested as a low cost way of resolving environmental disputes.

27. What was the estimated cost of putting your case before the Court?
28. What was the approximate cost of your participating in mediation?
29. If, in future, you were involved in an environmental dispute that was under appeal, would you promote or discourage the use of mediation? Why?

Information given to stakeholders prior to seeking their consent to an interview

Lincoln University
Environmental Management and Design Division
INFORMATION

You are invited to participate as a subject in a research project entitled 'An evaluation of mediation in environmental dispute resolution under s.268 of the Resource Management Act 1991'.

The aim of this project is to find out how environmental mediation is currently being practised in NZ. Using this information, it is planned to evaluate the practice of environmental mediation in NZ. It is hoped to be able to recommend ways in which future mediation could be enhanced.

Your participation in this project will involve your participation in an interview with the researcher, which may take between 30 to 45 minutes. It is recognised that mediation is a confidential process and that all matters discussed during mediation are to be treated confidentially. You will not be asked to supply any information relating to the nature of the conflict, the parties involved or the final settlement. During the interview you will only be asked questions relating to your experience and perception of the mediation process and the final outcome.

The results of the project may be published, but you may be assured of the complete confidentiality of data gathered in this investigation: the identity of participants will not be made public without their consent. To ensure anonymity and confidentiality, all data will be coded and kept secure. In writing the final report, reference to findings will be of a general nature, reference to geographical areas will not be included, no reference made to particular individuals or groups apart from general categories, e.g. mediators, Councils, public interest groups, land use conflicts, water/air discharge disputes. You will be able to view the research report when it is completed.

The research project is being carried out by Nancy Borrie who can be contacted at . She will be pleased to discuss any concerns you have about participation in the project.